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# A Kind of Judgment: Searching for Judicial Narratives After Death

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## A KIND OF JUDGMENT: SEARCHING FOR JUDICIAL NARRATIVES AFTER DEATH

TIMOTHY WILLIAM WATERS\*

### ABSTRACT

*Much of international criminal law's attraction rests on the 'authoritative narrative theory'—the claim that legal judgment creates incontestable narratives that serve as the foundation, or at least a baseline, for post-conflict reconciliation. So what happens when there is no judgment? This is the situation that confronted the International Criminal Tribunal for the Former Yugoslavia when its most prominent defendant, Slobodan Milošević, died. By turning scholarship's attention towards a terminated trial, this Article develops an indirect but powerful challenge to one of the dominant views about what international criminal law is for, with interdisciplinary implications for human rights, international relations, diplomacy, and political science.*

*What can be salvaged from the terminated Milošević trial? One candidate for substitute judgment was the Decision on the Motion for Acquittal brought under the Tribunal's Rule 98bis. Halfway through the trial, when the prosecution rested, the Trial Chamber had to decide whether there was a case to answer. The Chamber declared that the trial should go forward, though what the judges actually decided was necessarily ambiguous: The prosecution had presented enough evidence that a court could find Milošević guilty—but they didn't say that this court would.*

*Since there never was a final verdict, the decision has become a site of contestation and ambiguous value. This Article examines how the prosecution, defense, chambers, and outsiders deployed the Rule 98bis Decision to tell a story about Milošević's guilt or innocence and craft a final judgment in the eyes of the world, if not in the law. The doctrinal constraints on these efforts suggest real limits on international criminal law's ability to craft authoritative and transformative narratives through any trial process short of final judgment. By forensically exploring these limits, the Article also indicates parameters for an even more consequential investigation into whether the strong version of the authoritative narrative theory works under any circumstances.*

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#### INTRODUCTION: A NARRATIVE OF TRANSFORMATION, TERMINATED

One of the most common, if also most contested, claims for the efficacy of international criminal tribunals is that they produce authoritative narratives, which in turn contribute to reconciliation.<sup>1</sup> The key element in this claim is a court's final judgment. While many parts of a trial contribute to the production of narratives—such as the giving of testimony, introduction of documents, or the creation of archives—only the decisions of the court carry the imprimatur of official, consequential authority. This is especially true given the largely adversarial nature of the principal international tribunals.<sup>2</sup> Evidence submitted by one party and critiqued by the other is, by its nature, subject to and indeed the product of partisan interpretation, and it is the role of the judge to determine that evidence's ultimate value. It is judgment—grounded in the procedural integrity of the trial and sitting at the apex of the process—that produces the dispositive, displacing authority claimed for international criminal law's interpretations of violent conflict.

A contested claim, to be sure, but assuming one finds it plausible, what happens when there is no final judgment? Assuming one believes in the authoritative, transformative power of international criminal law (ICL) and its judgments, what can be salvaged from a terminated trial? This is precisely the question that confronted the International Criminal Tribunal for the Former Yugoslavia

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1. See, e.g., *About the ICTY*, INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/sections/AbouttheICTY> (last visited Apr. 3, 2011) ("The Tribunal has contributed to an indisputable historical record, combating denial and helping communities come to terms with their recent history. Crimes across the region can no longer be denied."); *The Hague Tribunal and Balkan Reconciliation*, INST. FOR WAR & PEACE REPORTING (Feb. 15, 2010), <http://www.iwpr.net/report-news/hague-tribunal-and-balkan-reconciliation> ("The website of the ICTY boasts that in the light of the court's work, 'It is now not tenable for anyone to dispute the reality of the crimes that were committed in and around Bratunac, Brcko, Celebici, Dubrovnik, Foca, Prijedor, Sarajevo, Srebrenica, and Zvornik to name but a few.' But the fact is that across the region, many people continue to do just that."); see also ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 24, 26–28 (2007) (discussing this claim and contestations of it); DIANE F. ORENTLICHER, THAT SOMEONE GUILTY BE PUNISHED: THE IMPACT OF THE ICTY IN BOSNIA 39–42 (2010).

2. See GEERT-JAN ALEXANDER KNOOPS, THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS 6–9 (2005) (describing the principally adversarial nature of international tribunals, though identifying a shift toward inquisitorial traits).

(ICTY)—its chamber, prosecution, defense, and indeed all actors with an interest in either the general project of ICL or its particular effects in the former Yugoslavia—when Slobodan Milošević died.<sup>3</sup>

The trial of Slobodan Milošević<sup>4</sup> was supposed to be the “history-making”<sup>5</sup> flagship case for the ICTY—the “capstone of the tribunal’s somewhat improbable rise from the margins of the international arena to that of a serious international institution.”<sup>6</sup> The “Butcher of the Balkans” to some, to others the “[S]avior of the Serbs,”<sup>7</sup> as Serbia’s leader from the late 1980s to 2000 Milošević was a critical player in the collapse of Yugoslavia and the violent wars of its dissolution. His exact role in and responsibility for those conflicts, as well as the role of the Serbian state apparatus he headed, however, were contested questions,<sup>8</sup> which his trial promised to finally answer.

It was clear, too, when Milošević was transferred to The Hague in 2001, that the transformative potential of ICL had not yet produced any demonstrable reconciliation in the former Yugoslavia.

3. See, e.g., Paul Tavernier, *The Death of Slobodan Milosevic and the Future of International Criminal Justice*, HAGUE JUSTICE PORTAL (Apr. 5, 2006), <http://www.haguejusticeportal.net/eCache/DEF/5/351/TG1Ug.html> (raising questions, in light of the trial’s termination, regarding the function of judicial institutions and the expectations of the international community in seeing former dictators brought to justice and historical truths established).

4. See generally *Prosecutor v. Milošević*, Case No. IT-02-54-T, First Amended Indictment (Int’l Crim. Trib. for the Former Yugoslavia Oct. 23, 2002) (describing the crimes with which Milošević was charged).

5. JUDITH ARMATTA, *TWILIGHT OF IMPUNITY: THE WAR CRIMES TRIAL OF SLOBODAN MILOSEVIC 1* (2010).

6. David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD AFF., Summer/Fall 2002, at 7, 8; see also Transcript of Opening Statement by Carla Del Ponte at 7–8, *Prosecutor v. Milošević*, Case No. IT-02-54-T (Int’l Crim. Trib. for the Former Yugoslavia Feb. 12, 2002) (“With the trial of this particular accused, we reach a turning point of this institution. The proceeding upon which the Chamber embarks today is clearly the most important trial to be conducted in the Tribunal to date. Indeed, it may prove to be the most significant trial that this institution will ever undertake.”); Milan Markovic, *In the Interests of Justice?: A Critique of the ICTY Trial Court’s Decision to Assign Counsel to Slobodan Milosevic*, 18 GEO. J. LEGAL ETHICS 947, 947 (2005) (“The Milosevic trial was hailed as a momentous event for both the [ICTY] and international justice as a whole.”); Michael P. Scharf, *The Legacy of the Milosevic Trial*, 37 NEW ENG. L. REV. 915, 916 (2003) (“*Prosecutor v. Slobodan Milosevic* is clearly the trial for which the Ad Hoc Court was created.”).

7. Lenard J. Cohen, *The Milošević Dictatorship: Institutionalizing Power and Ethno-Populism in Serbia*, in *BALKAN STRONGMEN: DICTATORS AND AUTHORITARIAN RULERS OF SOUTH EASTERN EUROPE* 425, 432 (Bernd J. Fischer ed., 2007) (quoting Dušan Janjić, *Od Etniciteta ka Nacionalizmu*, in *KULTURE U TRANZICIJI* 29 (Mirjana Prošić-Dvonić ed., 1994)); James L. Graff, William Mader & J.F.O. McAllister, *Slobodan Milosevic: The Butcher of the Balkans*, TIME, June 8, 1992, <http://www.time.com/time/magazine/article/0,9171,975723,00.html>.

8. See generally NORMAN CIGAR & PAUL WILLIAMS, *INDICTMENT AT THE HAGUE: THE MILOŠEVIĆ REGIME AND CRIMES OF THE BALKAN WAR* (2002) (examining the role of Serbian authorities in the war through key documents).

The various communities in the successor states to Yugoslavia held radically different visions of the wars' origins, of who was a victim and who a perpetrator, and what constituted justice.<sup>9</sup> Milošević's trial therefore promised to be the single greatest test of the tribunal's and ICL's ability to forge an efficacious and transformative narrative.<sup>10</sup> Thus, it was all the more disappointing when Milošević died four years into the trial, before judgment could be rendered.

The sudden termination of trials by death is not a hypothetical problem, nor is *Milošević* the only such instance. A surprisingly large share of international war crimes defendants die before their trials can be finished—nearly ten percent at the ICTY, higher at some other tribunals<sup>11</sup>—and given the nature of the conflicts that international criminal tribunals adjudicate and the continuing problems of enforcing indictments,<sup>12</sup> we can expect that the problem of defendants dying before judgment will continue to occur with regularity at the International Criminal Court and ad hoc tribunals. If, therefore, judgment is indeed essential to the ICL's transformative potential, there will be a significant number of cases in which that potential will be unrealized.

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9. See, e.g., ROLAND KOSTIĆ, *AMBIVALENT PEACE: EXTERNAL PEACEBUILDING, THREATENED IDENTITY AND RECONCILIATION IN BOSNIA AND HERZEGOVINA* 320 (2007) (reporting data from 2005 survey in Bosnia that found, *inter alia*, the following definitions of the war by ethnicity: "Civil war" – 3.7 percent of Bosniaks, 16.7 percent of Croats, and 83.6 percent of Serbs; "Aggression" – 95.1 percent of Bosniaks, 73.2 percent of Croats, and 9 percent of Serbs); Dan Saxon, *Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia*, 4 J. HUM. RTS. 559, 563–67 (2005) (describing different perceptions of the fairness of the International Criminal Tribunal for the Former Yugoslavia (ICTY) between Bosnian Muslims, Croats, and Serbs). *But see* Sanja Kutnjak Ivkovic & John Hagan, *The Politics of Punishment and the Siege of Sarajevo: Toward a Conflict Theory of Perceived International (In)Justice*, 40 LAW & SOC'Y REV. 369, 393 (2006) (noting that in surveys conducted in 2000 and 2003 in Bosnia "perceptions of the ICTY's fairness were little influenced by the respondents' ethnicity").

10. Scharf, *supra* note 6, at 916 (offering the view that the trial would "dictate the ultimate success or failure of the Tribunal itself as a mechanism for restoring peace in the Balkans").

11. See *infra* Part I.C.

12. See Lilian A. Barria & Steven D. Roper, *How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR*, 9 INT'L J. HUM. RTS. 349, 349 (2005) (noting that problems with apprehending suspects has reduced deterrent effect); James Blount Griffin, Note, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 VAND. J. TRANSNAT'L L. 405, 406–07 (2001) ("The enforcement of international criminal law, however, depends upon the unified political will and military power of the alliance that supports the international tribunal. Without the power of coercion, there is little or no enforcement."); Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 358–64 (2000) (describing the lack of enforcement as one of the greatest weaknesses of international criminal law (ICL)).

This Article considers how different actors have sought to characterize the meaning of the terminated *Milošević* trial in relation to this idea that courts produce consequential authoritative narratives. In particular, the Article examines efforts to deploy and interpret the one document that, more than any other, might be thought of as a substitute for judgment: the Trial Chamber's Rule 98*bis* Decision on the Motion to Acquit.<sup>13</sup>

Halfway through the trial, when the prosecution rested, the chamber had to decide if there was a case to answer.<sup>14</sup> In the chamber's Decision, issued in June 2004, the judges declared the trial should go forward, though what they decided was necessarily ambiguous: The prosecution had presented enough evidence that *a court could* find Milošević guilty, but the judges did not say that *this court would*.<sup>15</sup> The Decision, therefore, had an essentially interim quality, but because Milošević died before a final verdict was issued, the Decision has become a site of contestation—"the only pre-judgement determinative ruling of the Chamber on the case."<sup>16</sup>

This Article examines how the accused, *amici curiae*, prosecution, chambers, and outsiders have deployed the Decision to tell a story about Milošević's guilt or innocence and craft a final judgment in the eyes of the world, if not in law. Part I surveys claims that ICL judgments function as authoritative narratives that contribute to post-conflict transformation in unique ways. Next, after reviewing the history of the *Milošević* trial, Part II examines the Decision itself—in particular its standard of review, which is nearly identical to the common law "no case to answer." Part III then shows how the divergent strategic interests of the various parties in the trial

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13. Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004), *available at* [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/040616.htm](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.htm).

14. See GIDEON BOAS, THE MILOŠEVIĆ TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL CRIMINAL PROCEEDINGS 121–23 (2007) (noting that after the prosecution closed its case, the *amici curiae* filed their motion for judgment of acquittal on Milošević's behalf).

15. See *Milošević*, Decision on Motion for Judgement of Acquittal ¶ 288 ("On the basis of the inference that may be drawn from the evidence . . . a Trial Chamber *could* be satisfied beyond reasonable doubt that the Accused was a participant in the joint criminal enterprise. . . .") (emphasis added); *id.* ¶ 298 ("On the basis of the evidence . . . a Trial Chamber *could* be satisfied beyond reasonable doubt that the Accused aided and abetted or was complicit in the commission of the crime of genocide in that he had knowledge of the joint criminal enterprise, and that he gave its participants substantial assistance, being aware that its aim and intention was the destruction of a part of the Bosnian Muslim as a group.") (emphasis added); see also discussion *infra* Parts II.C, III.D.

16. BOAS, *supra* note 14, at 80.

created asymmetrical expectations about the purposes of the Decision and its content. Part IV examines responses to the Decision when it was issued—when it was assumed to be an interim step, rather than the last pronouncement the chamber would make—and finds, already then, critical elisions that appear to give the Decision the qualities of a judgment. Part V continues this reasoning, showing the ways in which, after Milošević's death, different actors tried to use the Decision as a quasi-judgment.<sup>17</sup> In particular, the International Court of Justice's *Bosnian Genocide* case shows both the possibilities and the limitations of deploying the Decision as a quasi-judgment. Lastly, Part VI concludes that the Decision's constraints show the tenuous nature of the ICL project, one of the principal justifications for which is radically contingent on reaching final judgment.

Going further, a close reading of the Decision indicates some parameters for an even more consequential inquiry into how real or limited the potential of final judgments is in achieving post-conflict transformation: it suggests, counterfactually, the proper scope for a test of the authoritative narrative theory. But although the analysis in this Article helps lay the groundwork for that broader theoretical investigation, its immediate purpose is forensic—a dissection of the Decision, its internal logic and institutional context, and the uses to which it was put once that context was radically disrupted by the *Milošević* trial's sudden termination.

## I. THE CONCEPT OF JUDGMENT AS AUTHORITATIVE NARRATIVE

### A. *The Authoritative Narrative Theory:*

Many justifications are advanced for the project of ICL.<sup>18</sup> One of its principal rationales is based on ICL's capacity to cut through

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17. I have restricted my analysis to the international legal sphere: courts and international organizations commenting on their activity. This leaves out an important set of actors: the people of the former Yugoslavia. Certainly, the ways in which journalists, politicians, and private individuals in the most affected societies talked about the Decision is important to a complete discussion of the Decision's contribution to creation of an authoritative narrative. However, for this Article, my primary methodological focus is doctrinal and logical; I wish to show what the Decision is structurally able to support, and to this end its formal, doctrinal use within international law is probative. I plan to review the actual deployment of the Decision (and the initial Indictment) in the former Yugoslavia in a separate paper.

18. See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 38, U.N. Doc. S/2004/616 (Aug. 23, 2004) (describing the objectives of *ad hoc* criminal tribunals as “bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims,



endemic partisan contestation and render incontestable, authoritative judgment about the events of divisive conflict; this authority undermines or drives out alternative claims and histories, creating space for shared understanding of truth, which, in turn, may serve as a prerequisite for reconciliation.<sup>19</sup> This rationale, which appears in many forms, is controversial and contested, but also deeply entrenched in both practice and scholarship; we may call it the “authoritative narrative theory” of ICL.

The authoritative narrative theory begins with an uncontroversial observation: In societies that have suffered violent conflict and horrendous war crimes, often along ethnic or sectarian lines, shared understandings about history and identity will often have been comprehensively destroyed.<sup>20</sup> Theorists and practitioners of post-conflict reconstruction commonly suggest that repairing these points of social connection is as important as restoring infrastructure,<sup>21</sup> and that some form of post-conflict justice—or even formal

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establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace”); cf. David S. Koller, *The Faith of the International Criminal Lawyer*, 40 N.Y.U. J. INT'L L. & POL. 1019, 1019–23 (2008) (critiquing the main justifications of international criminal law).

19. See, e.g., *About the ICTY*, *supra* note 1 (“For example, it has been proven beyond reasonable doubt that the mass murder at Srebrenica was genocide.”); see also *General Information*, INT'L CRIM. TRIBUNAL FOR RWANDA, <http://www.unictcr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (last visited Apr. 3, 2011) (“The purpose of this measure is to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region.”). Reconciliation was mentioned as a goal in the resolution establishing the Rwanda Tribunal. See S.C. Res. 955, pmbl., U.N. Doc. S/RES/955 (Nov. 8, 1994) (“*Convinced* that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law . . . would contribute to the process of national reconciliation and to the restoration and maintenance of peace.”). On the production of history through trials generally, see RICHARD ASHBY WILSON, *WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS* (2011) (including discussion of *Milošević*); LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST* (2001).

20. See, e.g., Sanela Basic, *Bosnian Society on the Path to Justice, Truth and Reconciliation*, in *PEACEBUILDING AND CIVIL SOCIETY IN BOSNIA-HERZEGOVINA: TEN YEARS AFTER DAYTON* 357, 367 (Martina Fischer ed., 2006), available at [http://www.berghof-conflictresearch.org/documents/publications/daytone\\_basic\\_rec.pdf](http://www.berghof-conflictresearch.org/documents/publications/daytone_basic_rec.pdf) (noting that in a comparison of how Bosnian textbooks treat the war, “one can only conclude that there is a sharp and profound disagreement with regard to this issue that both reflects and cements former ethnic divisions. . . . [R]egarding the nature of the conflict three explanatory models are being used: in textbooks for Serb pupils there was a civil war, in history books for Bosniaks the same event is described as aggression, whereas in the textbooks for Croat pupils it was a defensive war”).

21. See, e.g., INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, *RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK* 23 (David Bloomfield et al. eds., 2003), available at [http://www.idea.int/publications/reconciliation/upload/reconciliation\\_full.pdf](http://www.idea.int/publications/reconciliation/upload/reconciliation_full.pdf) (mentioning “historical accounting via truth-telling” along with “reparation of the material and psychological damage inflicted on the victims” as techniques of reconciliation); Michèle

criminal trials—is essential to the restoration and maintenance of peace.<sup>22</sup>

The strong version of the authoritative narrative theory — the view that accepts not only trial's role in creating truths, but their consequential value—follows this line of reasoning, arguing that formal criminal justice is not only an essential part of restoration, but also particularly efficacious.<sup>23</sup> The problem in post-conflict societies is that shared, generally respected understandings have been destroyed, and these are precisely what court judgments provide. The formal legal authority that attaches to a court judgment is different from mere opinion: (1) judgment has both the power of the state (or of the international community) behind it and the legitimacy of a neutral, professional judiciary; (2) a court's pronouncements follow trials that accord different views the opportunity to be weighed in a procedurally balanced forum; and (3) the court's powers of subpoena and contempt help assure that infor-

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Flournoy & Michael Pan, *Dealing with Demons: Justice and Reconciliation*, WASH. Q., Autumn 2002, at 111, 111–12, available at <http://www.twq.com/02autumn/flournoy.pdf> (“Grouping the concepts of justice and reconciliation together may strike some as inconsistent, but the two share a common objective—addressing past abuses and ongoing grievances arising from the conflict. . . . [P]ostconflict societies often require the introduction of accountability and restorative justice mechanisms to break cycles of impunity and violence.”); John J. Hamre & Gordon R. Sullivan, *Toward Postconflict Reconstruction*, WASH. Q., Autumn 2002, at 85, 91, available at <http://www.twq.com/02autumn/hamre.pdf> (stating that “[j]ustice and reconciliation addresses the need to deal with past abuses through formal and informal mechanisms for resolving grievances arising from conflict and to create an impartial and accountable legal system for the future” and arguing that this serves as one “pillar” of post-conflict reconstruction).

22. See CRYER ET AL., *supra* note 1, at 24–25; Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT’L L. 251, 251–56 (2007) (“[E]nsuring that perpetrators of atrocities face some reckoning can be critical to moving forward on both an individual and community level in societies recovering from violent conflict. Ensuring some measure of accountability may help victims come to terms with the past.”); Press Release, Office of the High Representative, Bas-Backer: Reconciliation Indispensable for Post-War Recovery (Oct. 27, 2006), available at [http://www.ohr.int/print/?content\\_id=38368](http://www.ohr.int/print/?content_id=38368) (“Justice, Truth, Peace and Forgiveness are four elements in a reconciliation process that is indispensable for post-war recovery.”).

23. See, e.g., Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 774 (1998) (“[B]y exposing the truth before an official and impartial public forum, the ICTY can contribute significantly to altering power realities that are vestiges of indoctrination and misinformation to ethnic hatred and violence. But the ICTY can only be effective if it can establish facts, hard and inescapable facts, with a moral or interpretive narrative based on elementary humanitarian values, which can become part of a shared truth for all peoples in the former Yugoslavia. Even if it were possible, it is not necessary to establish an official and exhaustive historical record for all times in order to bring about reconciliation. With the world community as witness, the unifying power of truth telling can help heal the wounds, exorcise the specters of the past, and build a solid moral foundation for future generations.”).

mation is made available.<sup>24</sup> Thus, when judgment is rendered after a procedurally fair trial, it exercises a special effect, undermining or displacing other merely partisan views. As more and more discursive space is occupied by views that more and more members of the society accept, the shared understandings essential to peaceful co-existence are restored.<sup>25</sup> This is a claim about a causal chain, and the chain originates in the trial process and its judgment.

The authoritative narrative theory has functional and genealogical roots in the common law and its adversarial process. While one might suppose that the civil law would be more amenable to the construction of authoritative narratives—after all, the civil law traditionally aspires to establish the truth, where the common law is content with the more pragmatic goal of a verdict<sup>26</sup>—the common law's historical dominance in constructing ICL<sup>27</sup> has inflected the authoritative narrative theory with its adversarial values and process, its expectation of partisan clashes mediated, and ultimately

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24. This is similar to what Stanley Hoffman called law's "distinct solemnity of effects." Stanley Hoffmann, *The Study of International Law and the Theory of International Relations*, 57 PROC. AM. SOC'Y INT'L L. 26, 34 (1963). Solemn or not, the coercive powers of a court are themselves exercised in a world of politics, and are generally reliant on state cooperation. See VICTOR PESKIN, *INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION* (2008).

25. Cf. *The Hague Tribunal and Balkan Reconciliation*, *supra* note 1 (noting Pierre Hazan's commentary that criminal courts make it possible to "narrow the scope of permissible lies . . . . If you can do that, maybe you can have different memories which can coexist peacefully . . . . And if you reach that point, even before reaching some kind of long-term common narrative, that's something significant.").

26. See Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 581 (1973) ("It is openly stated by some common law lawyers that the aim of criminal procedure is not so much the ascertainment of the real truth as the just settlement of a dispute. . . . In talking about ends of the criminal process continental lawyers place a primary emphasis on the discovery of the truth as a prerequisite to a just decision.").

27. See, e.g., Mark A. Drumbl, *Toward a Criminology of International Crime*, 19 OHIO ST. J. ON DISP. RESOL. 263, 272 (2003) ("Anglo-American common law approaches exert a somewhat disproportionate influence in the structure and functioning of international criminal law and adjudication."); cf. CRYER ET AL., *supra* note 1, at 351–52 (noting that as initially adopted "the ICTY procedures were mainly adversarial in nature," but acknowledging that "[m]any of the amendments have been in an inquisitorial direction, inter alia increasing the judges' controlling powers"); Daryl A. Mundis, *From 'Common Law' Towards 'Civil Law': The Evolution of the ICTY Rules of Procedure and Evidence*, 14 LEIDEN J. INT'L. L. 367, 368 ("While the first few trials at the Tribunal closely resembled common law criminal trials, the level of control being exercised by the Trial Chambers in recent cases is moving more in the direction of the civil law approach."). The International Criminal Court exhibits much less common law influence, however, and this merely genealogical influence is not determinative; there is no reason to think that the authoritative narrative theory operates exclusively in a common law environment.

resolved, by a neutral judge.<sup>28</sup> (We will return to this feature in Part III.)

Surely no scholar or practitioner thinks that a trial's *only* purpose is narrative, but for those who accept the authoritative narrative theory in some form, the creation of definitive narratives is one central purpose of having trials.<sup>29</sup> Moreover, this understanding of the theory intersects with claims about a 'right to truth'<sup>30</sup>—itself part of a broader secular process of convergence between ICL, human rights, and humanitarian law, as well as the related judicialization of international relations.<sup>31</sup> From this perspective, the expansive strategy of the *Milošević* prosecution was a laudable effort to tell the story of the entire Yugoslav crisis through the prism of Milošević's plan for a Greater Serbia.<sup>32</sup> These narratives are not identical to the writing of history, nor to a search for the truth, but

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28. CRYER ET AL., *supra* note 1, at 350 (describing the role of the judge in the common law system as "traditionally" like "a referee").

29. See, e.g., Yasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction?*, 88 INT'L REV. RED CROSS 245, 246 (2006) (discussing the traditionally limited role of the truth in domestic criminal law and its far broader purpose in ICL, and noting that "the unique objectives that international criminal law is supposed to fulfill . . . range from such lofty goals as contributing to 'the restoration and maintenance of peace' and 'the process of national reconciliation' to . . . reconstructing national identities from interpretations of the past through criminal legal analysis and process, and setting down a historical record with a legal imprint"); see also Daniel Joyce, *The Historical Function of International Criminal Trials: Re-thinking International Criminal Law*, 73 NORDIC J. INT'L L. 461, 462–63 (2004); Richard Ashby Wilson, *Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia*, 27 HUM. RTS. Q. 908, 917–18 (2005).

30. Naqvi, *supra* note 29, at 248 (discussing the U.N. Commission on Human Rights Resolution 2005/66, which "[r]ecognizes the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights").

31. See, e.g., CRYER ET AL., *supra* note 1, at 9–11 (discussing the relationship and reliance of ICL on human rights and humanitarian law); Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 FORDHAM L. REV. 721, 722 (2006) (describing the turn to legal discourse and judiciaries for broad questions of public policy and traditionally political issues, especially through international tribunals). Logically, it is possible to accept the value of trials in producing accepted truths without concluding that this necessarily has any reconciliatory effect; this describes an interim, moderate version of the authoritative narrative theory, though one with its own controversies about the nature and social acceptance of truth.

32. See, e.g., ARMATTA, *supra* note 5, at 4–6; Wilson, *supra* note 29, at 918 (noting the larger historical questions in the *Milošević* trial that "the ICTY ha[d] no choice but to decide"). The Prosecution's approach was also a consequence of its charging strategy – its need to prove special intent for genocide – and its decision to seek joinder of the three indictments, which required a common plan. See discussion accompanying notes 89–91, *infra*.

contribute to those processes, creating a social consensus in which history-writing and shared understanding are possible.<sup>33</sup>

The hard, optimistic edge of this view—that trials are or should be principally about generating transformative narratives, and are particularly good at it—has receded in recent years.<sup>34</sup> To retrench, however, is not to abandon, and even as scholars and practitioners sophisticate their claims, they have preserved an important role for narrative.<sup>35</sup> Individual trials may not create undeniable truths about conflicts, but they introduce and vet evidence that can serve as baselines to counter specific denialist accounts, and establish facts and contexts necessary to a broader narrative. For example, adjudicating the mental state of defendants or deploying a theory like joint criminal enterprise (JCE) implicitly requires a court to say something about social contexts and war aims.<sup>36</sup> Moreover, the tribunal's jurisprudence as a whole provides broader narrative

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33. See Lawrence Douglas, *History and Memory in the Courtroom: Reflections on Perpetrator Trials*, in *THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945*, at 95, 96 (Herbert R. Reginbogin & Christoph J.M. Safferling eds., 2006) ("Trials . . . particularly those burdened with the legacy of traumatic history, often succeed at shaping the terms of collective memory precisely by demonstrating—intentionally or not—a relaxed fidelity to the historical record."). This perspective has been applied to ICTY trials as well. See Wilson, *supra* note 29, at 922–42 (describing the *Tadić* and *Krstić* judgments as extensive narratives of the Yugoslav conflict).

34. See, e.g., Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 532 (2008) ("[T]he recent drive of the ICTY and ICTR toward completion of their proceedings has pushed the proceedings further away from some of their original political purposes and toward the adjudicative model."); cf. ARMATTA, *supra* note 5, at xi, 1 (noting that "[t]he [*Milošević*] trial was about one person. It did not and could not provide a complete historical record or a full accounting of all people who perpetrated war crimes," but also criticizing the ICTY for allowing Milošević to "further the 'myth of Milosevic' concerning Serb victimhood").

35. See Wilson, *supra* note 29, at 917–18. See generally Joyce, *supra* note 29 (assessing the narrative role of trials and their limits through a study of Philip Allott, Hannah Arendt, and Martha Minow's works, and proposing further recognition of the historical function of these trials).

36. See *Prosecutor v. Delalić*, Case No. IT-96-21, Judgement, ¶¶ 196–220 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999); MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 215 (1997). Joint criminal enterprise (JCE) is a theory of liability describing participation in a common plan or purpose that is itself criminal, or includes criminal acts. There are three types: type I, in which individuals share a specific criminal intent, like a murder; type II "systems of ill-treatment," such as concentration camps; and type III or theater JCE, in which individuals are liable for the "natural and foreseeable consequence of effecting [the] common purpose," such as ethnically cleansing a region. Types II and III require evidence of the scale and consequences of the system or campaign. See *Prosecutor v. Tadić*, Judgment, ICTY Appeals Chamber, Case No. IT-94-1-A, ¶¶ 195–204 (July 15, 1999); Alison Marston Danner and Jenny S. Martinez, *Guilty Association: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 102–10 (2005).

authority than any one trial.<sup>37</sup> From this perspective, the *Milošević* prosecution's broad framing might not have produced a dispositive narrative on its own, but it could have contributed to one, and could still.<sup>38</sup>

### B. *Skepticism—The Theory's Critics*

Equally, other observers question the claim that judgments catalyze the creation of authoritative, transformative narratives.<sup>39</sup> For these critics, courts' technical procedures and their focus on specific legal questions make them ill-equipped to write histories.<sup>40</sup> The fiction of combat between competing narratives balanced by a neutral judge who then arrives at a fuller truth strains credulity. The extraordinary imbalance in resources between any given international prosecution and any given defense team is well known;<sup>41</sup>

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37. See DIANE F. ORENTLICHER, *SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF THE ICTY IN SERBIA* 73 (2008), available at [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/serbia\\_20080520/serbia\\_20080501.pdf](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/serbia_20080520/serbia_20080501.pdf) (suggesting that other trials in the "The Hague may result in judgments that achieve some of the results expected in the Milošević case, shedding light on the relationship between Belgrade and Serb forces operating in Bosnia and Croatia").

38. Other trials at the ICTY have considered parts of the same crime base that underlay Milošević, and judgments in some of those cases have discussed Milošević's own role. See, e.g., *Prosecutor v. Milutinović*, Case No. IT-05-87-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009). Something similar may well occur in the trial of Radovan Karadzic or, eventually, of Ratko Mladic.

39. See, e.g., Helena Cobban, *International Courts*, FOREIGN POL'Y, Mar.-Apr. 2006, at 22, 22-28 (questioning the contribution of ICL to peace and human rights or the demand for criminal process from victims). These views have a considerable pedigree. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 233 (1964) (suggesting that courts should not try to undertake historical interpretations of conflicts' origins); CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETATIVE ANTHROPOLOGY* 173 (1983) ("[W]hatever it is that the law is after it is not the whole story.").

40. See MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 79-94 (1997). Wilson, though ultimately favoring a history-writing role for courts, ably explicates the main arguments of "the long-held assumption in socio-legal scholarship that courts are inappropriate venues to construct wide-ranging historical explanations of past conflicts." See Wilson, *supra* note 29, at 909. He describes these arguments as "Incompatibility" (law and history have distinctive processes and epistemologies), "Partiality" ("courts are too selective and limited in scope to reveal the 'whole story'"), and the critique that "law produces *Boring History*" (law displays a technical approach and "üresome proceduralism"). *Id.* at 912-16; cf. Martti Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. UNITED NATIONS. L. 1, 11-19 (2002) (opposing legal truth, with its individual focus, to historical truth, with its contextual focus).

41. See *Prosecutor v. Tadić*, Case No. IT-94-I-A, Judgement, ¶¶ 29-56 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999) (addressing the issue of imbalance, but concluding that "the Appellant has failed to show that the protection offered by the principle of equality of arms was not extended to him by the Trial Chamber"); BOAS, *supra* note 14, at 32-43 ("[I]t is obvious that the resources at the disposal of the prosecution in any

for self-representing defendants such as Milošević, it evidently can reach to the limits of physical endurance.<sup>42</sup>

Furthermore, true justice requires a neutral, or at least non-partisan, position in the contestation of histories and nationalist perspectives,<sup>43</sup> but the neutrality of the court and its officers is often purchased through an almost total abstraction from and ignorance of the local communities whose conflicts the court must adjudicate.<sup>44</sup> Indeed, for the theory's critics, it is not clear that there is a simultaneously neutral and informed position: the questions most critical to those for whom an authoritative narrative is most needed—the citizens of the former conflict zone—are often of a nature and complexity that will escape a neutral outsider.

These problems are magnified by the adversarial nature of international criminal law. In its domestic incarnations, the adversarial trial system has been conceptually content with verdicts rather than truth; the ambitious grafting of the further, higher goal of truth—incontestable, undeniable, and displacing truth—onto the mechanics of adversarial trials overreaches. These imbalances and defects undermine the very idea that international courts produce

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proceedings before the ICTY is substantially greater than that available to the accused . . . . [T]he quantity of defence funding to service trials of high-level officials, when compared with the resources expended on those cases by the Office of the Prosecutor, may be considerably unbalanced.”); James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616, 669–74 (2005) (stressing that the recurrent problem of inequality of arms persists in the Special Court for Sierra Leone because of disproportionate allocation of resources and structural design flaws). *But see* Prosecutor v. Delalić, Case No. IT-96-21, Decision on the Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, ¶¶ 44–49 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 4, 1998) (ordering the Defense to supply the Prosecution with a list of witnesses on a theory of equality of arms).

42. See BOAS, *supra* note 14, at 265–70; PATRICIA M. WALD, TYRANTS ON TRIAL: KEEPING ORDER IN THE COURTROOM 40–42 (2009); Michael P. Scharf, *Self-Representation Versus Assignment of Defence Counsel Before International Criminal Tribunals*, 4 J. INT'L CRIM. JUST. 31, 38–40 (2006) (arguing for the imposition of a counsel because of the complexity of international crimes cases).

43. Wilson notes Arendt's argument that “overbearing pressures to construct a nationalist narrative in the courtroom had detracted from the pursuit of justice and violated principles of due process.” Wilson, *supra* note 29, at 911.

44. See, e.g., Elena Baylis, *Tribunal-Hopping with the Post-Conflict Justice Junkies*, 10 OR. REV. INT'L L. 361, 365 (2008); *The Hague Tribunal and Balkan Reconciliation*, *supra* note 1 (noting that “it is clear that whatever chance the ICTY had to contribute to the complex process of reconciliation was for a long time compromised by its failure to engage with people in the region”). For a powerful empirical critique of the ways in which international tribunals generate unreliable witness testimony, in part because the process is unresponsive to cultural differences, see NANCY COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2010).

sufficiently balanced and deliberate outcomes to merit authoritative respect in the first place.

Apart from these process-based or normative concerns, the authoritative narrative theory also faces an empirical challenge—one that also questions broader claims about post-conflict transformation through law: Quite apart from whether international courts can construct informed, neutral narratives, can the narratives they do construct actually do what the theory supposes, which is contribute to reconciliation? Of course this is a methodologically fraught proposition – how could one possibly prove, definitively, the particular effect of this one variable amid the complexity of a society in transition? Yet although certainty is impossible, the imperfect evidence we do have does not appear to support the strongest claims of the theory: In the former Yugoslavia, there is little evidence that fifteen years of judgments from the ICTY have changed the minds of people divided by violent conflict or demonstrably moved individuals in the different successor states towards a common vision of the conflict, or even a shared understanding of their roles in it.<sup>45</sup> Early enthusiasms for international tribunals as agents of reconciliation have become subdued in the absence of any evidence that reconciliation is occurring in the former Yugoslavia, let alone that the ICTY has contributed to it.<sup>46</sup> The recent turn to expressive the-

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45. See John B. Allcock, *The International Criminal Tribunal for the Former Yugoslavia*, in *CONFRONTING THE YUGOSLAV CONTROVERSIES* 346, 380 (Charles Ingrao & Thomas A. Emmert eds., 2009) (investigating local perceptions of the Tribunal and concluding that “[a]spirations that it might provide anything like a complete account of the experience of war have not been met - and for pragmatic reasons, cannot be. The hope that it might promote reconciliation between the peoples of the regions does not appear to have been realized. Reconciliation, if it is to be achieved, is an immense task that will clearly require more than judicial intervention and will extend well beyond the lifetime of the ICTY.”).

46. See, e.g., INT’L CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA, REPORT OF THE PRESIDENT ON THE CONFERENCE ASSESSING THE LEGACY OF THE ICTY 1–2 (2010) (“It was widely agreed upon that the ICTY had made a tremendous contribution to bringing justice to the affected populations in the former Yugoslavia, but the communities have not yet reconciled and this is not something that could be achieved by the Tribunal alone.”); Janine Natalya Clark, *Judging the ICTY: Has it Achieved its Objectives?*, 9 SOUTHEAST EUR. & BLACK SEA STUD. 123, 134–36 (2009) (acknowledging the lack of ICTY’s contribution to reconciliation); *The Hague Tribunal and Balkan Reconciliation*, *supra* note 1 (discussing lack of reconciliation in Bosnia and finding an “incredibly complex state of affairs in which convenient assumptions about justice, truth and reconciliation quickly dissolve. Our findings suggest that if the ICTY is able to play any role in fostering reconciliation in the Balkans, it can only do so within the context of an intricate web of interlinked factors which could take decades to unravel. At the heart of the problem lies an intense resistance by many in the region to the reality that their own ethnic kin committed atrocities.”). This latter report also cites Professor Steven Burg as commenting: “As a social phenomenon I certainly do not think [the ICTY is] working . . . . There’s no evidence in the political behaviours—in the voting patterns, in the way local governments function or don’t function—that reconciliation has



ories to justify ICL is, in part, a recognition that both deterrence and reconciliation rest on an empirically weak base.<sup>47</sup> In the Balkans and elsewhere, it is simply not necessarily true that single narratives win out after conflict.<sup>48</sup>

For these skeptics, the *Milošević* prosecution's strategy was a sprawling overreach that lost sight of the core purposes of having a trial and succumbed to the lure of a broader narrative of victimhood.<sup>49</sup> These skeptics would prefer a narrower forensic trial paradigm in which such aspirations are rigorously excluded from consideration in designing and managing trials.<sup>50</sup> At most, a forensic trial might contribute indirectly to historians' construction of narratives, but the court's own judgment will have little value, even in this indirect way, if its process has not rigorously excluded the ambitious goals that proponents of the authoritative narrative theory advocate for trials.

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happened anywhere." *Id.* But see LARA J. NETTELFIELD, *COURTING DEMOCRACY IN BOSNIA AND HERZEGOVINA: THE HAGUE TRIBUNAL'S IMPACT IN A POSTWAR STATE* 3 (2010) (examining the ICTY's positive impact on Bosnia's democratic transition); ORENTLICHER, *supra* note 1, at 39–44, 105–06 (discussing some of the effects of the ICTY's reconciliation and truth-telling work in Bosnia).

47. See Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561, 590 (2002) ("Everybody knows that prevention does not work. . . ."); David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 474 (1999) ("Unfortunately, the connection between international prosecutions and the actual deterrence of future atrocities is at best a plausible but largely untested assumption."). See generally Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39 (2007) (reviewing various rationales for punishment and preferring expressive theories). On expressivism, see generally MARK DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 173–80 (2007).

48. See Gerry J. Simpson, *Didactic and Dissident Histories in War Crimes Trials*, 60 ALB. L. REV. 801, 833–36 (1997) (recognizing the existence of dissident narratives). Bogdan Ivanisevic, *The Milošević Trial is Doing Its Job*, HUM. RTS. WATCH (Aug. 30, 2004), <http://www.hrw.org/en/news/2004/08/30/milosevic-trial-doing-its-job> ("The Hague tribunal has not altered this mentality of collective denial [among Serbs about the crimes committed in the conflict]. Nor can it be expected to; that change must come from Serbia itself.").

49. See Gideon Boas & Timothy L.H. McCormack, *Learning the Lessons of the Milošević Trial*, 9 Y.B. INT'L HUMANITARIAN L. 65, 73–74 (2006) ("Throughout the *Milošević* trial proceedings the Prosecution persistently proclaimed its responsibility to all the victims of the three theatres of conflict . . . . Laudable though such a sentiment may be, it was impossible to satisfy the legitimate needs, interests and concerns of all the victims of all three Balkan conflicts over eight years, particularly in the context of a single criminal trial against one accused. The Prosecution's specific allegations against Milošević reflect a commitment to include reference to as many municipalities as possible.").

50. See BOAS, *supra* note 14, at 133–38; OSIEL, *supra* note 40, at 90; Ruti Teitel, *Bringing the Messiah Through the Law*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 177, 182–83 (Carla Hesse and Robert Post eds., 1999).

C. *The Special Problem of Death*

It is not necessary to decide between these two general views, however, because from either perspective, there will be a problem with a *terminated* trial's contribution to the construction of narratives. The latter view is skeptical about any judgment's ability to transform societies;<sup>51</sup> but even though the former view is considerably more enthusiastic,<sup>52</sup> the weakest link in its argument turns out to be the first one: the existence of a judgment. For, at rates that would constitute a national scandal in a domestic jurisdiction, defendants in international criminal processes die. Out of the 161 individuals indicted at the ICTY, sixteen have died before completion, or even initiation, of their trials<sup>53</sup>—a mortality rate just under 10 percent. Some tribunals with smaller dockets have had even higher death rates: Two of the Special Court for Sierra Leone's thirteen indictments have been withdrawn due to death,<sup>54</sup> and the International Criminal Court's record to date is only slightly better.<sup>55</sup> Other tribunals have had less dramatic rates, but still con-

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51. See Marko Attila Hoare, *Bosnia-Herzegovina and International Justice: Past Failures and Future Solutions*, 24 E. EUR. POL. & SOC'Y 191, 203 (2010) ("[T]here is no evidence to suggest that the ICTY—with no prior allocation of guilt to one side in the war, by treating war crimes on a purely individual basis, and by lumping together war criminals from all sides—has made any contribution to reconciliation between the former Yugoslavs. On the contrary; unlike after World War II, the international community has failed to impose a narrative of who was to blame for the War of Yugoslav Succession and to force each side to accept it. Consequently, each side continues to see itself as the victim in the conflict and to see the tribunal's record purely in terms of how too many of its own people and/or too few of the other sides' have been indicted, or how the other sides' indictees have been wrongfully acquitted or received too short sentences.").

52. See, e.g., SCHARF, *supra* note 36, at 215 ("The record of the [*Tadić*] trial provides an authoritative and impartial account to which future historians may turn for the truth, and future leaders for warning. While there are various means to achieve an historic record of abuses after a war, the most authoritative rendering is possible only through the crucible of a trial that accords full due process.").

53. See *Key Figures*, INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/sections/TheCases/KeyFigures> (last updated Mar. 28, 2011). Ten died before they could be transferred, while six died during their trials. *Id.*

54. *About the Special Court for Sierra Leone*, SPECIAL CT. FOR SIERRA LEONE, <http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx> (last visited Apr. 3, 2011).

55. Two of the seventeen individuals indicted by the International Criminal Court are already dead. See *Situations and Cases*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Apr. 3, 2011) (noting the death of Raska Lukwiya). Vincent Oti, also indicted as part of the situation in Uganda, is dead, although the ICC still lists him as at large. See Noel Mwakugu, *Obituary: LRA deputy Vincent Oti*, BBC News, (Jan. 23, 2008), available at <http://news.bbc.co.uk/2/hi/africa/7083311.stm> (last visited May 8, 2011); *Wanted by the ICC*, ENOUGH PROJECT, [http://www.enoughproject.org/files/pdf/lra\\_leaders.pdf](http://www.enoughproject.org/files/pdf/lra_leaders.pdf) (last visited Apr. 3, 2011).

front this problem.<sup>56</sup> Efforts to try crimes in municipal courts under international standards confront similar problems owing to the antiquity of the underlying events,<sup>57</sup> or even because death need not be only accidental, but can be strategic.<sup>58</sup>

When defendants die, trials stop. Because there are no mechanisms for rendering judgment *post mortem* or *contra mortuum*,<sup>59</sup> the trial simply ends, no outcome issues, and therefore, by the selfsame logic of the authoritative narrative theory, because the first critical link in the chain is never forged, the subsequent links never are either.<sup>60</sup>

Nor is the problem only implicated by actual physical death: trials that are terminated on technical or procedural grounds—really, any trial that, for whatever reason, ends without a full evaluation of the substantive evidence according to legal standards—should fail to produce the kind of judgment the theory requires.<sup>61</sup>

56. Two of eighty-two defendants before the ICTR have died prior to completing trial. See *Cases: Status of Detainees*, INT'L CRIM. TRIBUNAL FOR RWANDA, <http://www.unict.org/tabid/173/Default.aspx> (last visited Apr. 3, 2011). None of the five persons indicted by the Extraordinary Chambers of the Courts of Cambodia have died, but only one has been convicted, and in Case 2, which is due to begin soon, the four defendants are in their late seventies and eighties. See Seth Mydans, *Anger in Cambodia Over Khmer Rouge Sentence*, N.Y. TIMES, July 26, 2010, <http://www.nytimes.com/2010/07/27/world/asia/27cambodia.html?th&emc=th>.

57. Bangladesh, for example, has recently announced proceedings against individuals involved in the violent events of independence from Pakistan in 1971. See David Manes, *Bangladesh Establishes Tribunal for 1971 War Crimes*, JURIST, Mar. 26, 2010, <http://jurist.law.pitt.edu/paperchase/2010/03/bangladesh-establishes-tribunal-for.php>. Recent proposals in Spain and Argentina to investigate crimes in the Spanish Civil War would result in indictment of individuals, the youngest of whom—assuming they had reached the age of majority when the war ended—would now be eighty-nine years old. See David Manes, *Argentine Prosecutor Recommends Dropping Spanish War Crimes Cases*, JURIST, May 2, 2010, <http://jurist.org/paperchase/2010/05/argentina-prosecutor-recommends-dropping-spanish-war-crimes-cases.php>.

58. Saddam Hussein was executed following trial on a limited set of charges (pertaining to one massacre of 148 individuals in Dujail in 1982), before he could be tried a much larger array of charges that would have been critical to any attempt to use the trial process to construct a narrative of his rule. See *Iraq court drops Saddam's charges*, NEWS (BBC), Jan. 8, 2007), available at [http://news.bbc.co.uk/2/hi/middle\\_east/6239853.stm](http://news.bbc.co.uk/2/hi/middle_east/6239853.stm). Thanks to Prof. Mark Drumbl for this point.

59. Systems that tolerate trial *in absentia* should, in theory, have no objection to the idea, but this is not an option at the tribunals.

60. See ORENTLICHER, *supra* note 37, at 80 (quoting the opinion of one pollster: "Because of Milošević's death, his trial did not have a 'wow effect.' He's dead, and he was not guilty. Had he been found guilty, we'd be able to get rid of this bad stuff and move toward cooperation with the European Union.").

61. Such terminations have been relatively rare, but have occurred, or nearly occurred, in prominent cases, such as *Barayagwiza* at the ICTR and, more recently *Lubanga* at the International Criminal Court. See PESKIN, *supra* note 24, 177–82 (discussing the acquittal of Barayagwiza on human rights grounds and subsequent reinstatement of the

Whether from death or any other cause, the termination of a trial is an “[i]nterrupted [p]erformance[ ],” whose narrative is incomplete.<sup>62</sup>

Trials are not only about narrative; many other goals have been advanced and even preferred for holding international trials.<sup>63</sup> The creation of narrative, however, has assuredly been one of the principal goals for many advocates and theorists, and whatever else trials may do, here we consider how that goal is affected by premature termination. Similarly, a final judgment is not the only part of a trial that has any value; other effects manifest themselves throughout the trial process. Certainly, the residuum of a terminated trial has uses—the accumulated transcripts, exhibits, briefs, orders, and interim decisions constitute an archive with a meticulously documented provenance that any historian would value.<sup>64</sup> It seems undeniable that other acts and images in a trial—confession in open court, a shocking film—can come to have an iconic or emotive value greater, in their way, than formal authority.<sup>65</sup> More

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case against him); *Cases & Situations: Lubanga Case*, COALITION FOR INT’L CRIM. CT., <http://www.iccnw.org/?mod=drctimelinelubanga> (last visited Apr. 3, 2011) (discussing near-release of Lubanga due to abuses of the trial process).

62. DRUMBL, *ATROCITY*, *supra* note 47, at 177 (“Milošević’s premature death is an obstacle to the ICTY’s narration of an overarching story of death and destruction in the Balkans.”).

63. See, e.g., M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 737–40 (2003) (listing prevention, enhancement of peace, providing victims with redress and remembrance); CRYER ET AL., *supra* note 1, at 18–25 (defining the aims of ICL to include goals of punishment, such as retribution, deterrence, denunciation, education, incapacitation and rehabilitation, but also justice for victims, recording history, and post-conflict reconciliation). Pursuit of justice—whether for its own sake or for instrumental purposes—is surely the most commonly proffered rationale. See, e.g., Ivanisevic, *supra* note 48 (stating that the Hague “tribunal’s main task is to provide justice for the victims and their families in the former Yugoslavia. . . . [U]ltimately its success will be judged by whether it can deliver justice, not by how long that process takes or whether it affects Serbia’s politics.”).

64. See HUM. RTS. WATCH, *THE BALKANS, WEIGHING THE EVIDENCE: LESSONS FROM THE SLOBODAN MILOSEVIC TRIAL* 14 (2006) (“Even though the lengthy trial process did not lead to a verdict, the information introduced at trial was itself important. Future generations will use the evidence to understand the region’s history and how the conflicts came to pass.”).

65. For example, Dražen Erdemović’s apology and expression of remorse arguably made a greater impression on the judges than is apparent from the more restrained text of the judgment. See *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996). Similarly, the so-called *Scorpions* video — showing a massacre at Srebrenica — though not formally admitted into evidence, nonetheless had a powerful impact in the former Yugoslavia. (The video, however, was found, not by the ICTY, but by a Serbian activist, who also sent it to Serbian television stations; it is not clear, therefore, how much the ICTY’s own deployment of the video contributed to that effect.) See Daniel Williams, *Srebrenica Video Vindicates Long Pursuit By*

generally, the trial process itself—hearings, procedures, evidence-taking, and testimony, indeed the very fact of a trial<sup>66</sup>—may have an influence on people in post-conflict societies who see the rule of law as an alternative approach to social division taking shape.<sup>67</sup> As Richard Holbrooke declared following Milošević's death, “the trial was the verdict. . . . The Serb people came to understand the truth that he was not a nationalist, but an opportunist. A kind of rough and imperfect justice was served.”<sup>68</sup>

Yet as valuable as these elements may be, they are structurally secondary and second-best: Judgment has a hierarchically superior role to these ancillary effects—most of whose purpose, really, is to contribute to and demonstrate the integrity of judgment—and it is hard to imagine a robust argument for holding a criminal trial if one knew in advance that it would end without judgment. What Holbrooke calls “rough and imperfect justice” is really the absence of authority and its effect; indeed, he calls it that precisely to make up for the evident fact that its authority is deficient. Thus, the particular problem posed by *Milošević* is the lack of final authority and the consequent search—at least by those convinced that judgment matters—for an alternative. For some people, that search lighted upon what looked like the nearest thing: the Trial Chamber's 2004 Decision on the Motion to Acquit.

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*Serb Activist*, WASH. POST, June 25, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/24/AR2005062401501.html>.

66. See, e.g., *The Death of Slobodan Milosevic*, TRANSITIONAL JUST. FORUM (Mar. 11, 2006), <http://tj-forum.org/archives/001780.html> (“Even without a final verdict against Milošević, the ICTY has contributed to transitional justice in Bosnia. . . . [T]he Tribunal was able to secure the transfer of Milošević and others to its custody for trial, thus piercing these former leaders' aura of invulnerability and permitting positive political change to begin in Serbia & Montenegro.”).

67. See, e.g., Chandra Lekha Sriram, *Justice for Whom? Assessing Hybrid Approaches to Accountability in Sierra Leone*, in SECURITY, RECONSTRUCTION, AND RECONCILIATION: WHEN THE WARS END 145, 147 (Muna Ndulo ed., 2007) (“[P]unishment may serve to restore or install democracy, the rule of law, and respect for human rights by making it clear that law proscribes certain actions and these actions are subject to punishment.”). But see Jane Stromseth, *Justice on the Ground: Can international Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?*, 1 HAGUE J. ON RULE OF L. 87, 88–89 (2009) (noting the limited impact of international criminal tribunals on the rule of law in post conflict societies).

68. Marlise Simons & Gregory Crouch, *Milosevic is Found Dead in Cell, U.N. Officials Say*, N.Y. TIMES, Mar. 12, 2006, <http://www.nytimes.com/2006/03/12/international/europe/12hague.html>.

## II. THE RULE 98BIS DECISION AND ITS CONTEXT

### A. *The ICTY and the Milošević Trial*.<sup>69</sup>

The ICTY was founded in 1993 by the United Nations Security Council, acting under its Chapter VII authority to take measures to ensure “international peace and security.”<sup>70</sup> From the beginning, some observers have understood this use of the United Nations’ power to mean that the tribunal, though a juridical institution, also had an implicitly political function—a mandate to contribute both to ending the ongoing wars in Bosnia and Croatia, and to eventual post-war reconciliation.<sup>71</sup>

Regardless, the ICTY was first and foremost a court, charged with trying individuals accused of committing violations of recognized international law in connection with the conflicts in the former Yugoslavia.<sup>72</sup> The first international tribunal since Nuremberg, the ICTY’s Statute and the Rules of Procedure and Evidence are hybrids, but demonstrate considerable influence from the common law, adversarial model.<sup>73</sup> The ICTY prosecutor issued his first

69. On the trial, see generally ARMATTA, *supra* note 5; BOAS, *supra* note 14; MICHAEL P. SCHARF & WILLIAM A. SCHABAS, *SLOBODAN MILOSEVIC ON TRIAL: A COMPANION* (2002).

70. U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall . . . decide what measures shall be taken . . . to maintain or restore international peace and security.”); *see also id.* art. 41 (“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions.”).

71. See Michael Humphrey, *International Intervention, Justice and National Reconciliation: The Role of the ICTY and ICTR in Bosnia and Rwanda*, 2 J. HUM. RTS. 495, 496 (2003) (“The fact that the life span of the ICTY is explicitly linked to the restoration of peace reflects this wider role of international prosecutions. They are part of the institutionalizing strategies, along with peace negotiations, democratic elections and truth commissions to promote national reconstruction after mass atrocity.”); *see also* ORENTLICHER, *supra* note 1, at 39 (“The word ‘reconciliation’ is not used in the Security Council resolution establishing the ICTY, nor is it included in the goals of the Tribunal set forth on its own Web site. Even so, many have assumed that the Security Council’s determination that creating the ICTY would contribute to peace includes the notion of reconciliation—a view that has at times been reflected in ICTY judgments and reports.”); Press Release, Int’l Criminal Tribunal for the Former Yugoslavia, The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina (May 17, 2001), *available at* <http://www.icty.org/sid/7985> (referring to the Tribunal’s “mission of reconciliation”); *The Hague Tribunal and Balkan Reconciliation*, *supra* note 1 (“[I]t has been widely hoped that the ICTY had a role to play beyond simply dispensing criminal justice. . . . [O]ver the years, an expectation has persisted that the ICTY’s work would or should help to reconcile the peoples of the Balkans with their violent recent history, even if only as a by-product of its central, specifically judicial aims.”).

72. Statute of the International Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 2, U.N. Doc. S/RES/827 (May 25, 1993).

73. See KNOOPS, *supra* note 2, at 6–9; Louise Arbour, *The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results*, 3 HOFSTRA L. & POL’Y SYMPO. 37, 46 (1999) (stating that “the Tribunals are completely dominated by the Anglo-American common law system”); Megan Fairlie, *The Marriage of Common and Continental*

indictments in 1994, the first trial began in 1995, and soon many more followed.<sup>74</sup>

Slobodan Milošević was already an established political leader before any of this occurred, and even before the founding of the tribunal, he and his government were the focus of war crimes accusations.<sup>75</sup> An apparatchik in the Serbian Communist Party in Tito's Yugoslavia, Milošević rose to the prominence in the late 1980s amid economic crisis, rising nationalist sentiment, and political paralysis.<sup>76</sup> Depending on one's view, Milošević was the political beneficiary of this process, its principal instigator, or both.<sup>77</sup> By the time Slovenia withdrew from Yugoslavia in mid-1991, Milošević was President of Serbia, the most powerful actor in Yugoslavia, and a recognized leader of Serbs throughout the country.<sup>78</sup> Violent conflict broke out later that year over the withdrawal of Croatia, whose large Serb minority resisted with support from Belgrade.<sup>79</sup> Bosnia's withdrawal, in early 1992, initiated another conflict, this time with three-way fighting between Bosniaks, Serbs, and Croats.<sup>80</sup>

As the most powerful figure in the remainder of Yugoslavia, Milošević had considerable military and political resources at his disposal to intervene in these conflicts, and his influence was widely acknowledged.<sup>81</sup> Throughout this period, there were calls

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*Law at the ICTY and its Progeny, Due Process Deficit*, 4 INT'L CRIM. L. REV. 243, 268–70 (2004) (providing that the Statute of the ICTY adopted an adversarial structure).

74. See *About the ICTY: Timeline*, INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/action/timeline/254> (last visited Apr. 3, 2011).

75. See Int'l Criminal Tribunal for the Former Yugoslavia, *Path to the Hague: Selected Documents on the Origins of the ICTY* 55 (1996) (providing text of Eagleburger's speech); RACHEL KERR, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS AND DIPLOMACY* 35 (2004) (discussing U.S. Secretary of State Lawrence Eagleburger's December 1992 "'naming names speech' in which he announced that the United States had identified ten suspected war criminals who should be prosecuted, including Milošević").

76. SCHARF & SCHABAS, *supra* note 69, at 9–12.

77. *Id.* (suggesting that Milošević and his wife may have orchestrated the principal incident that transformed him into a Serb national hero).

78. *Id.* at 11–12.

79. *Id.* at 18–20.

80. For a description of the conflicts, see generally MISHA GLENNY, *THE FALL OF YUGOSLAVIA: THE THIRD BALKAN WAR* (1994); LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* (1997).

81. See, e.g., Stuart J. Kaufman, *An 'International' Theory of Inter-Ethnic War*, 22 REV. INT'L STUD. 149, 159–62 (1996) (describing the conflicts as elite-led violence with Milošević as a central player). See generally Agneza Božić-Roberson, *Words Before the War: Milošević's Use of Mass Media and Rhetoric to Provoke Ethnopolitical Conflict in Former Yugoslavia*, 38 E. EUR. Q. 395 (2004) (analyzing Milošević's central role in these conflicts through his rhetoric).

for his prosecution,<sup>82</sup> but the ICTY prosecutor only issued an indictment in May 1999 and at first, only for events in Kosovo, where hundreds of thousands of ethnic Albanians were expelled and NATO forces had intervened.<sup>83</sup> Milošević stayed in power until late 2000, when he was forced to concede defeat in an election and was transferred, in mid-2001, to The Hague.<sup>84</sup> Indictments for crimes in Croatia and Bosnia were added.<sup>85</sup> In all, Milošević was charged with sixty-six counts of war crimes, crimes against humanity, and, for Bosnia, genocide.<sup>86</sup> Moreover, underlying these counts were thousands of individual allegations.<sup>87</sup> Milošević was charged on theories of direct and command responsibility,<sup>88</sup> each of which required proving his relationship to chains of command for the armed forces, police, and paramilitaries doing the actual killing.

Shortly before trial began, the prosecutor joined the three indictments.<sup>89</sup> The theory by which the prosecution successfully argued for joinder was that Milošević and others were involved in a single “transaction” of alleged crimes in three conflicts and three countries spanning eight years—an overarching JCE whose members sought to create a “Greater Serbia” through the violent expulsion of non-Serbs.<sup>90</sup> The prosecution therefore promised not only to demonstrate Milošević’s guilt, but to do so in a way that showed the complicity of the senior leadership of Serbia, the Republika Srpska in Bosnia, and the Serbian Republic of the Krajina in Croatia.<sup>91</sup> The prosecution’s theory, implicitly, sought to explain the

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82. See PAUL WILLIAMS & NORMAN CIGAR, *WAR CRIMES AND INDIVIDUAL RESPONSIBILITY: A PRIMA FACIE CASE FOR THE INDICTMENT OF SLOBODAN MILOŠEVIĆ I* (1996).

83. See *Prosecutor v. Milošević*, Case No. IT-99-37, Indictment, ¶¶ 90–100 (Int’l Crim. Trib. for the Former Yugoslavia May 22, 1999), available at [http://www.icty.org/x/cases/slobodan\\_milosevic/ind/en/mil-ii990524e.htm](http://www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-ii990524e.htm). On Kosovo, see generally TIM JUDAH, *KOSOVO: WAR AND REVENGE* (2000).

84. SCHARF & SCHABAS, *supra* note 69, at 35–38.

85. *Id.* at 38.

86. BOAS, *supra* note 14, at 1.

87. *Id.*

88. See *Milošević*, Indictment ¶¶ 5–28, 29–33 (listing Milošević’s responsibility under articles 7(1) and 7(3) of the ICTY statute).

89. *Prosecutor v. Milošević*, Case Nos. IT-99-37-PT, IT-01-50-PT & IT-01-51-PT, Decision on Prosecution’s Motion for Joinder, ¶¶ 2, 16 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 13, 2001), available at [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/11213JD516912.htm](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/11213JD516912.htm).

90. *Id.* ¶ 16. Rule 49 stipulates that “[t]wo or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.” See ICTY R. P. & EVID. 49.

91. BOAS, *supra* note 14, at 80–92 (discussing the content and scope of the indictments).



origins and course of the entire conflict—an ambitious goal, but one perfectly fit to the creation of a powerful, comprehensive narrative that might, in turn, be used to transform whole societies.

The trial began in 2002. Over the next four years, an enormous documentary record was produced—over 1.2 million pages of documentation, hundreds of witnesses, and tens of thousands of pages of transcripts.<sup>92</sup> Throughout the trial, Milošević denied the legitimacy of the tribunal and refused counsel, although he took an active role in the proceedings, cross-examining witnesses and arguing points.<sup>93</sup> Milošević's decision to represent himself became one of the defining features of the trial, providing him with a very public platform to advance his own interpretation of Yugoslavia's conflicts, provoking several showdowns with the chamber, and adding considerably to the length of an already sprawling trial.<sup>94</sup> Because he was not represented by counsel despite the enormous burdens of case preparation, the chamber appointed *amici curiae* to assist him;<sup>95</sup> their tasks included raising certain motions, including filing a motion of acquittal at the end of the prosecution phase.<sup>96</sup>

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92. *Id.* at xii–xiii.

93. *Id.* at 10–12.

94. See WALD, *supra* note 42, at 51–54 (discussing the obstacles raised by Milošević's self-representation); David Scheffer, *The Hague War Crimes Tribunal: Enough of Milošević's Antics*, N.Y. TIMES, July 13, 2004, [http://www.nytimes.com/2004/07/13/opinion/13iht-edscheffer\\_ed3\\_.html](http://www.nytimes.com/2004/07/13/opinion/13iht-edscheffer_ed3_.html). But see Prosecutor v. Milošević, Case No. IT-02-54, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, ¶¶ 1, 20, 39, 41 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 4, 2003) (rejecting the prosecution motion to impose defense counsel because of the adversarial character of the proceedings and the existence of a right to defense oneself, and noting Milošević's competence, health and conduct did not preclude a fair and expeditious trial). The prosecution made further requests that the chamber impose counsel. See, e.g., Prosecution Motion for a Hearing to Discuss the Implications of the Accused's Recurring Ill Health ¶ 8, Prosecutor v. Milošević, Case No. IT-02-54-T (Int'l Crim. Trib. for the Former Yugoslavia Sept. 23, 2003). In part, this was out of fair trial concerns, but it was also because Milošević's self-representation provided him with a highly effective public platform.

95. Three *amici* were appointed by the Registrar on September 6, 2001. Prosecutor v. Milošević, Case No. IT-02-54-T, Reasons for Decision on Assignment of Defence Counsel, ¶ 4 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 22, 2004), available at [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/040922.htm](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040922.htm). In late 2004, when the defense phase began (shortly after the Decision this Article discusses was issued), the chamber imposed counsel on Milošević, appointing the same lawyers who had previously served as *amici*. See generally *id.* (setting out the reasons for the September 2, 2004 oral ruling imposing counsel).

96. Following a request for clarification by the *amici*—in essence, a request from them—the chamber ruled that the *amici* could pursue the motion. Prosecutor v. Milošević, Case No. IT-02-54-T, Order on Amici Curiae Request Concerning the Manner of their Future Engagement and Procedural Directions under Rule 98bis, at 2 (Int'l Crim. Trib. for the Former Yugoslavia June 27, 2003).

B. *The Decision*

The prosecution rested in February 2004 and in early March, the *amici* filed a motion under Rule 98*bis*, requesting acquittal on a number of counts and allegations; the prosecution filed a confidential response.<sup>97</sup> Milošević himself, still not recognizing the ICTY's authority, filed no motion.<sup>98</sup> The chamber issued the Decision on June 16, 2004, allowing each count to stand, but throwing out some elements of individual charges.<sup>99</sup> Judge Robinson wrote a separate opinion, and Judge Kwon wrote a partial dissent.<sup>100</sup>

The Decision is over 140 pages long and goes into considerable detail about both the legal standard applied and the individual allegations challenged by the *amici*—much more detail than Rule 98*bis* decisions in other cases, which were often “brief rejections without much reasoning or analysis.”<sup>101</sup> The length may be because of the exceptionally large number of allegations on which the chamber decided to acquit and because of the “important legal questions . . . concerning the existence of an armed conflict in

97. Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶ 4 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004), *available at* [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/040616.htm](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.htm). The *amici*'s motion also included confidential annexes. *Id.*

98. *Id.* ¶ 3.

99. *Id.* ¶ 316–30. Several examples are discussed in the remainder of this Article.

100. *Id.* at 135–39 (Robinson, J., concurring); *id.* at 140 (Kwon, J., dissenting in part).

101. BOAS, *supra* note 14, at 122. The earliest decisions from before 2000 (often brought under Rule 54, before Rule 98*bis* was promulgated, or with reference to both) are only two or three pages—as in *Delalić*, *Blaškić* and *Kupreskić*—but since then the decisions have been getting longer: *Kordić/Ćerkez* (2000)—nine pages; *Galić* (2002)—eleven pages; *Blagojević/Jokić* (2004)—twenty-one pages. See Prosecutor v. Delalić, Case No. IT-96-21, Order on the Motions to Dismiss the Indictment at the Close of the Prosecutor's Case (Int'l Crim. Trib. for the Former Yugoslavia Mar. 18, 1998); Prosecutor v. Blaškić, Case No. IT-95-14, Decision of Trial Chamber I on the Defence Motion to Dismiss (Int'l Crim. Trib. for the Former Yugoslavia Sept. 3, 1998); Prosecutor v. Kupreskić, Case No. IT-95-16, Decision on Motion of the Accused Vlatko Kupreskić to the Trial Chamber to Order the Entry of Judgement of Acquittal, Pursuant to Rule 98*bis* of the Rules of Procedure and Evidence (Int'l Crim. Trib. for the Former Yugoslavia Jan. 8, 1999); Prosecutor v. Kordić, Case No. IT-95-14/2, Decision on Defence Motions for Judgment of Acquittal (Int'l Crim. Trib. for the Former Yugoslavia Apr. 6, 2000); Prosecutor v. Galić, Case No. IT-98-29-T, Decision on the Motion for the Entry of Acquittal of the Accused (Int'l Crim. Trib. for the Former Yugoslavia Oct. 3, 2002); Prosecutor v. Blagojević, Case No. IT-02-60, Judgment on Motions for Acquittal Pursuant to Rule 98*bis* (Int'l Crim. Trib. for the Former Yugoslavia Apr. 5, 2004). *Jelisić* (1999) and *Sikirica* (2001) are considerably longer—forty-four and sixty pages respectively—but then these deal with successful motions to acquit on genocide charges (and, in *Sikirica*, with multiple accused); even these are less than half as long as the Decision in *Milošević*. See Prosecutor v. Jelisić, Case No. IT-95-10, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999); Prosecutor v. Sikirica, Case No. IT-95-8, Judgment on Defense Motions to Acquit (Int'l Crim. Trib. for the Former Yugoslavia Sept. 3, 2001).

Kosovo, the legal tests for deportation and forcible transfer and existence of Statehood for Croatia" upon which several counts relied.<sup>102</sup>

The immediate consequence of the Decision was that trial continued. The accused and the *amici*—rechristened as assigned counsel—had to defend against each count, although not against every element the prosecution had originally advanced in the final indictment.<sup>103</sup> Instead, the chamber ordered the prosecution to prepare a redlined version of the indictments and it was against this version that Milošević and the assigned counsel defended.<sup>104</sup> Indirectly, the continuation of the trial led to the climax and drawn-out dénouement of the self-representation crisis in *Milošević*, as Milošević's role in the defense phase became even more central and his denialist strategy and poor health even more disruptive of the trial process than the chamber and prosecution had envisioned.<sup>105</sup>

### C. *Standard of Review*

Defeating a motion to acquit imposes an extremely low threshold—more than is required for an initial indictment, but not by

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102. BOAS, *supra* note 14, at 122–23. Dr. Boas was Senior Legal Officer in Trial Chamber III, which heard *Milošević*, and therefore has good reason to know. *Id.* at xviii.

103. *Id.* at 126 (noting that 183 challenges to allegations were granted).

104. Prosecutor v. Milošević, Case No. IT-02-54-T, Submission of Red-lined Versions of Indictments Pursuant to Trial Chamber "Order to Prosecution on Indictments Following Rule 98bis Decision, at 2 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2004).

105. See Anthony Deutsch, *Citing Health, Tribunal Assigns Milosevic 2 Lawyers*, ASSOCIATED PRESS, Sept. 3, 2004, available at 2004 WLNR 19362000; Arthur Max, *Milosevic's Lawyers Ask to Quit, Citing Noncooperation*, ASSOCIATED PRESS, Oct. 28, 2004, available at 2004 WLNR 19273250; Michael P. Scharf, *Making a Spectacle of Himself: Milosevic Wants a Stage, Not the Right to Provide His Own Defense*, WASH. POST, Aug. 29, 2004, at B2; Marlise Simons, *Court Looks for Ways to Speed Milosevic Trial*, N.Y. TIMES, July 28, 2004, <http://www.nytimes.com/2004/07/28/world/court-looks-for-ways-to-speed-milosevic-trial.html>; *Milosevic Too Ill for Self-Defense*, ASSOCIATED PRESS, Sept. 3, 2004, available at 2004 WLNR 17600367.

much.<sup>106</sup> At the time the Decision was issued,<sup>107</sup> Rule 98*bis* provided for acquittal before the defense phase if the trial chamber “finds that the evidence is insufficient to sustain a conviction on that or those charges.”<sup>108</sup> Within the tribunal’s jurisprudence, the test for insufficiency derives, as so much does, from the *Tadić* case, through subsequent refinements in other cases,<sup>109</sup> and confirmation by the Appeals Chamber in *Jelisić* and *Milošević*:

‘Whether there is evidence (if accepted) upon which a tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question . . . ; thus the true test is not whether the trier of fact would actually arrive at a conviction beyond reasonable doubt on the Prosecution evidence if accepted, but whether it could;’ or to put it as the Appeals Chamber later did in the same case, a Trial chamber should only uphold a Rule 98*bis* Motion if it is ‘entitled to conclude that no reasonable trier of fact could find the evidence sufficient to sustain a conviction beyond reasonable doubt’<sup>110</sup>

Having identified a definitive test, the *Milošević* chamber immediately clarifies how it will apply the test, saying it will acquit:

[w]here there is no evidence to sustain a charge<sup>111</sup> [and w]here there is some evidence, but it is such that, taken at its highest, a Trial Chamber could not convict on it . . . even if the weakness in evidence derives from the weight to be attached to it, for example the credibility of a witness.<sup>112</sup> But [the court continued, w]here there is some evidence, but it is such that its

106. See Steven Freeland, *Commentary, in* ANNOTATED LEADING CASES OF THE INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 2003, at 129, 135 (André Klip & Göran Sluiter eds., 2008) (comparing the test of Rule 98*bis* with the *prima facie* requirement of an indictment, and noting that “[g]iven that the [Rule 98*bis* motion] arises after the prosecution has had the opportunity to present its evidence-in-chief before the tribunal, as opposed to simply relying on the evidence contained in the indictment, this may explain why . . . the standard applied by the tribunal appears to be of a higher threshold than with the confirmation of an indictment”); Karel de Meester, *Commentary, in* ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 2003–2004, at 449, 455 (André Klip & Göran Sluiter eds., 2010) (“The standard of proof required in Rule 98*bis* proceedings is lower than the standard of proof normally required in criminal proceedings.”).

107. The Rule was amended shortly after the Decision was issued, and, as discussed *infra* Part III.D.1, probably in consequence of it.

108. See ICTY R. P. & Evid. 98*bis* (B) (1999) (amended Dec. 8, 2004).

109. The Decision notes the contributions from *Delalić* and *Kordić*. Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶¶ 9–10 (Int’l Crim. Trib. for the Former Yugoslavia June 16, 2004), available at [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/040616.htm](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.htm).

110. *Id.* ¶ 9 (citing Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement, ¶ 37 (Int’l Crim. Trib. for the Former Yugoslavia July 5, 2001)).

111. *Id.* ¶ 13(1).

112. *Id.* ¶ 13(2).

strength or weakness depends on the view taken of a witness' credibility and reliability, and on one possible view of the facts a Trial Chamber could convict on it, [the trial should continue].<sup>113</sup>

Sufficiency should be determined "on the basis of the evidence as a whole,"<sup>114</sup> but the chamber also considers "the sufficiency of the evidence [for a given charge] as it pertains to elements of [the] charge"<sup>115</sup>—that is, not as an all-or-nothing evaluation of the whole charge. It was on this basis that the chamber was ultimately able to acquit Milošević on hundreds of specific allegations while preserving each overall count.

Throughout its deliberation on a motion to acquit, the chamber is obliged to take the prosecution's evidence at its highest—to assume the evidence's credibility unless it is utterly incapable of belief.<sup>116</sup> This is true of all the factual evidence: in discussing the question of Milošević's guilt under a so-called JCE III theory,<sup>117</sup> the chamber noted that it:

will not make a final determination as to the one or the other basis at this stage, that is, whether to acquit the Accused at this stage of one or the other basis of liability. The reason is that a determination as to the Accused's liability depends to a certain extent on issues of fact and the weight to be attached to certain items of evidence, which calls for an assessment of the credibility and reliability of that evidence. These issues do not arise for determination until the judgement phase.<sup>118</sup>

Much of the chamber's reasoning will sound familiar to lawyers in the common law tradition, because it is, almost verbatim, the motion for "no case to answer." Indeed, the chamber's application

113. *Id.* ¶ 13(3).

114. *Id.* ¶ 13(4).

115. *Id.* ¶ 13(1).

116. *See id.* ¶ 13(3) (obliging the Chamber to uphold the prosecution evidence if "on one possible view of the facts a Trial Chamber could convict on it"); and *id.* ¶ 13 (6) (citing *Prosecutor v. Jelisić*, IT-95-10-A, Judgement ¶ 55 (July 5, 2001) ("The Trial Chamber was required to assume that the prosecution's evidence was entitled to credence unless incapable of belief. That is, it was required to take the evidence at its highest and could not pick and choose among parts of that evidence.")).

117. This is the broadest form of JCE, contemplating liability for all members of the JCE for any reasonably foreseeable crimes committed by any members, even if the others did not share the requisite *mens rea* for those crimes. *See* Rebecca L. Haffajee, Note, *Prosecuting Crimes of Rape and Sexual Violence at the ICTR*, 29 HARV. J.L. & GENDER 201, 214 (2006). For example, genocide, which is a special intent crime, could be charged against a member of a JCE of type III, even if that member, himself, did not intend to commit genocide. This was one of the bases for the charge of genocide against Milošević, and which will turn out to play an important role in how we must understand the meaning and utility of the Decision.

118. *Milošević*, Decision on Motion for Judgement of Acquittal ¶ 293.

of the *Jelisić* test follows point for point the logic of the classic formulation from *R v. Galbraith*, which the Decision quotes at length.<sup>119</sup>

The Decision consistently distinguishes between “*the* Trial Chamber” deciding this case and “*a* Trial Chamber” when considering the standard of review.<sup>120</sup> It is therefore advancing something rather like the typical appellate standard: an appellate court normally reverses the court below only if no reasonable trier of fact could find otherwise, just as, in this case, the chamber will acquit only if no reasonable trier of fact could convict—even if this particular trier of fact, the trial chamber sitting in this case, already knows it would not. Indeed, the chamber reiterates that “a ruling that there is sufficient evidence to sustain a conviction on a particular charge does not necessarily mean that the Trial Chamber will, at the end of the case, return a conviction on that charge[;]” it even notes that it would be possible to acquit even if the accused called no evidence.<sup>121</sup>

The standard of review, and the position of the Decision at the mid-point of trial, suggest its interim quality. If a chamber accepts a motion to acquit, this terminates proceedings—a decisive and consequential step that logically has the same effect as final judgment does within the authoritative narrative model.<sup>122</sup> But if a chamber denies the motion, trial continues without prejudice to the final evaluation of the sufficiency and meaning of the evidence, testimony, briefs, or other elements of the trial, apart from the minimal gloss that they were not, considered in the most positive light, impossibly inadequate.

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119. *Id.* ¶ 12. We will return to the chamber’s treatment of the common law analogy in the next section.

120. *See, e.g., id.* ¶ 13(7) (“When, in reviewing the evidence, the Trial Chamber makes a finding that there is sufficient evidence, that is taken to mean that there is evidence on which a Trial chamber could be satisfied beyond reasonable doubt of the guilt of the accused.”).

121. *Id.* ¶ 13(6). This is a feature of the rule that has caused considerable consternation: “It is apparent that the rationale behind the *sui generis* ‘no case to answer’ mechanism at the ICTY, whereby, following a ruling that there is sufficient evidence to sustain a conviction on particular charge at the end of the prosecution[’s] case, it is nonetheless possible for the same trial chamber to acquit the accused at the end of the case (even where she or he calls no evidence) has left many at loss.” Idi Gaparayi, *The Milošević Trial at the Halfway Stage: Judgement on the Motion for Acquittal*, 17 LEIDEN J. INT’L L. 737, 752 (2004). As we shall see, this is not the part of the rule that should leave people confused.

122. BOAS, *supra* note 14, at 122 (“The Rule is crafted as a procedural safeguard to ensure that in circumstances where ‘even on its own evidence the prosecution has failed to prove its case’, [sic] the proceedings against an accused can be terminated.”).

But as to the effect on final judgment, there is no valence, or almost none, from denying a Rule 98*bis* motion, as the *Milošević* chamber did. The only effect is to continue the trial—and at the time, as their behavior suggests, this was the expectation of all parties, which means they too understood the Decision as an interim step, rather than something final.<sup>123</sup> How then did those various actors react to the prospect, and then the fact, of the Decision? Did those reactions change when what was supposed to be interim became terminal?

### III. ASYMMETRICAL STRATEGIC INTERESTS SURROUNDING THE DECISION

The different parties had very different interests in the Decision. Obviously, the prosecution, Milošević, and the *amici* desired different outcomes, but they, and the judges, also had different institutional relationships to the Decision that created not merely opposing or divergent interests, but asymmetries affecting how they interpreted and reacted to the Decision.

#### A. *The Accused*

Milošević, who had consistently denied the legitimacy of the tribunal,<sup>124</sup> did not need to take any position on the Decision; its pronouncements had no authority because to him the tribunal was illegitimate *ab initio*. Despite this delegitimizing strategy, however, Milošević took an increasingly active part in the trial<sup>125</sup> and certainly had a strategic interest in the Decision: full acquittal would have been a triumphant vindication for him, and even acquittal on

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123. Carla Del Ponte's address to the Security Council on June 30, 2004, just after the Decision, did not mention the *Milošević* case in particular. Press Release, Int'l Criminal Tribunal for the Former Yugoslavia, Address by Carla del Ponte, Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council (June 30, 2004), available at <http://www.icty.org/sid/8404>.

124. See, e.g., SCHARF & SCHABAS, *supra* note 69, at 97–100.

125. See BOAS, *supra* note 14, at 12 (“Milosevic himself had no intention of playing into the prosecution's hands and remaining mute while the case against him was laid out and determined. Despite his belligerence towards the court, he engaged in a robust and, at times, competent forensic defence.”); Joanne Williams, *Slobodan Milosevic and the Guarantee of Self-Representation*, 32 BROOK. J. INT'L L. 553, 582 (2007) (“Milosevic ‘fully engaged in the cross-examination of Prosecution witnesses’ and presented consecutive witnesses in his defense, thereby actively partaking in trial proceedings” (quoting Prosecution Response to “Assigned Counsel Appeal Against the Trial Chamber's Decision on Assignment of Defence Counsel” and to “Defence Reply to ‘Prosecution Motion to Strike Ground of Appeal (3) from Assigned Counsel Appeal Against the Trial Chamber's Decision on Assignment of Defence Counsel’” ¶ 90 n.144, Prosecutor v. Milošević, Case No. IT-02-54-AR73.7 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 11, 2004))).

some counts would have brought the prosecution's case into question.

Milošević may have been genuinely concerned that the Decision could be interpreted as a vindication of the prosecution's basic claims, or he may not have perceived its potential for undermining the prosecution's case, but, either way, his rejectionist strategy led him to not fully exploit opportunities presented to him by the Decision, such as stressing the large number of specific allegations that were dropped.<sup>126</sup> To do so would have required him to change the public strategy he had consistently followed throughout the trial. Exploiting the Decision would have meant engaging with it, not only pragmatically,<sup>127</sup> but in a way that would legitimate it: emphasizing that it had acquitted him on some allegations would not only have begged the question about all the others, but also conceded the chamber's authority to acquit him. Milošević's grand strategy of public rejectionism encouraged him to a judicious silence; after all, he had not even filed his own motion for acquittal—Milošević was not asking the court for judgment.

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126. The transcripts for the defense phase do not show Milošević discussing the Decision, although the assigned counsel and prosecution do on various occasions. Once, after it is first invoked by Judge Robinson, Milošević makes an oblique reference to the Decision in a discussion of municipalities in Bosnia in which genocide was charged—some of which had been removed by the Decision:

JUDGE ROBINSON: You are finished reading that list. Let me remind you, Mr. Milosevic, that the Rule 98*bis* decision found that there was not enough evidence to support the allegation in paragraph 32 [of the indictment] in relation to some of the villages or municipalities mentioned. In fact, as far as paragraph 32 is concerned, you need only concern yourself with Brcko, Prijedor, Sanski Most, Srebrenica, Bijeljina, Kotor Varos, Kljuc, Bosanski Novi. And I am checking to see whether the decision affected paragraph 33.

THE ACCUSED: [Interpretation] Mr. Robinson, could you please let me know what evidence, as you say there was no evidence for these places, but what was the evidence that Mr. Nice presented here about the other places linking me—

JUDGE ROBINSON: Mr. Milosevic. Mr. Milosevic, the Rule 98*bis* decision was published and was available to you. But I bring that to your attention so we don't waste time. And I'll ask the legal officer to give me the information in relation to paragraph 33. Go ahead, Mr. Milosevic.

Transcript of Record at 43693, Prosecutor v. Milošević, Case No. IT-02-54-T (Int'l Crim. Trib. for the Former Yugoslavia Sept. 5, 2005). This exchange shows that, in effect, Milošević accepted the benefit the Decision conferred—its removal of certain municipalities from the list of allegations—but, persisted in denying that *any* evidence had been submitted and, apparently, refused to actually read the Decision (or to admit that he had).

127. See Boas, *supra* note 14, at 12 (noting that Milošević "all the time maintain[ed] at least the façade that he was interested only in telling the 'truth' to the world, a political and social truth, that placed NATO and its member States, as well as the Vatican, on trial. Yet although the rhetoric gradually subsided and Milošević cooperated superficially with the trial process and the institution he had vowed to bring down, his conduct and manipulative talents continued to have an extraordinary impact on the viability of the proceedings.").



But for the *amici curiae*, prosecution, and chamber, the calculus was different: their roles in the trial process assumed, accepted, and depended upon the Tribunal's legitimacy. They needed to engage with the Decision substantively and procedurally, and had incentives to characterize it in particular ways to the other parties and the world.

### B. *The Amici Curiae*

The *amici* could hardly ignore or ultimately undermine the Decision; after all, they had filed the original motion of acquittal—a power they had evidently actively sought.<sup>128</sup> Thus, the *amici's* strategic position in relation to the Decision is perhaps most conventionally contrasted with that of the prosecution: seeking diametrically opposed outcomes, but in a structurally analogous position vis-à-vis the institution. In filing the motion for acquittal, the *amici* appeared to be standing in for the accused.

But to suppose that the *amici curiae* occupied the structural position normally filled by a cooperative defendant is not entirely right because, as their name and the history of their appointment implies, the *amici* were formally mandated to aid the court, not the accused. The chamber first appointed the *amici* when it became clear that Milošević was going to refuse counsel and represent himself; their mandate was “not to represent the accused but to assist in the proper determination of the case” and specifically to “assist the Trial Chamber”<sup>129</sup> by:

(a) making any submissions properly open to the accused by way of preliminary or other pre-trial motion; (b) making any submissions or objections to evidence properly open to the accused during the trial proceedings and cross-examining witnesses as appropriate; (c) drawing to the attention of the Trial Chamber any exculpatory or mitigating evidence; and (d) acting in any other way which designated counsel considers appropriate in order to secure a fair trial . . . .<sup>130</sup>

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128. Prosecutor v. Milošević, Case No. IT-02-54-T, Order on Amici Curiae Request Concerning the Manner of their Future Engagement and Procedural Directions under Rule 98bis, at 2–3 (Int'l Crim. Trib. for the Former Yugoslavia June 27, 2003) (noting the *amici's* request for clarification of their role in relation to Rule 98bis and authorizing the absence of one of the *amici* from July 2003 forward to prepare the motion).

129. Prosecutor v. Milošević, Case No. IT-99-37-PT, Order Inviting Designation of *Amicus Curiae*, 2 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 30, 2001).

130. *Id.*; see also WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 621 (2006) (discussing the role of the *amici curiae* in *Milošević*).

Thus, although the *amici* indeed were empowered to represent certain interests of the accused, they were also circumscribed in that power and had other, distinct obligations running to the chamber.<sup>131</sup> The *amici* were far from true substitutes for the accused, with whom they shared only an imperfect identity of interest.

Consistent with the *amici*'s role as advisors to the chamber rather than substitute defense counsel, their motion to acquit was restrained and neutral: in particular, the *amici* did not challenge the prosecution's core theory of Milošević's liability and they did not actually move for acquittal on all charges; instead, they challenged a narrower range of counts and charges for which the prosecution had presented no evidence whatsoever, or which relied on a particular legal test or interpretation the *amici* contested.<sup>132</sup> In the first group were, for example, most allegations of shelling and sniping at Sarajevo; those in the second group concerned disagreement about the dates on which armed conflict in Kosovo had begun and Croatia had become a state—issues affecting the jurisdiction of the tribunal and that concerned a choice of legal theories as much as factual claims.<sup>133</sup> The *amici* also challenged certain allegations that had been charged under multiple theories.<sup>134</sup>

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131. This role was consistent with the evolving understanding of *amici*'s purpose. See BOAS, *supra* note 14, at 251–56 (describing how the role of the *amici curiae* in the Milošević trial differs from their tradition functions). See generally Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963) (describing the historical definition of the *amicus curiae* in common law and the shift of its role from neutrality to advocacy in the U.S.). Krislov explains that:

On occasion, the *amicus curiae* has been an agent of the court acting as champion of the court's point of view, vigorously pursuing and defending a legal position at the request of the bench itself. In the main, however, the *amicus curiae* has been a means of fostering partisan third party involvement through the encouragement of group representation by a self-conscious bench.

*Id.* at 720–21.

132. BOAS, *supra* note 14, at 126–28 (noting that the *amici curiae* “did not challenge the prosecution case in respect of [Milošević’s] criminal responsibility” but only the 185 separate allegations).

133. These claims, had they been accepted, would have led to acquittal on counts under Articles 3 and 5 of the statute.

134. For example, the *amici* moved for dismissal of some allegations concerning forced removals from the village of Nogavac, which had formed part of Kosovo Counts 1 and 2. Count 1 referred to deportation, which involves forced transfer over an international frontier; Count 2 referred to forcible transfer, which involves forced transfer inside a state. The prosecution incorporated by reference the same paragraphs for both counts. See *Amici Curiae Motion for Judgement of Acquittal Pursuant to Rule 98bis ¶¶ 39–60*, Prosecutor v. Milošević, Case No. IT-02-54-T (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2004) (discussing forced transfers and the climate of terror). The *amici* objected that for removals from the village of Nogavac, there was no evidence of removal across a frontier, and therefore they challenged that allegation as part of Count 1, but they did not challenge the

Only on Bosnia did the *amici* challenge more directly the prosecution's evidentiary basis by arguing that there was no evidence that Milošević committed or was complicit in genocide; they also disputed the prosecution's theory concerning the proper *mens rea* for joint criminal enterprise of the broad JCE III type.<sup>135</sup> Apart from the genocide charges, however, the *amici* did not challenge entire counts for Bosnia, only specific allegations in the Schedules.<sup>136</sup>

As for the other allegations and counts not directly challenged, the *amici*'s brief "does not comment upon the sufficiency of the evidence called by the [p]rosecution on those counts upon which no submission to acquit has been made under Rule 98bis."<sup>137</sup> Perhaps the *amici* thought this was a form of professional resolve, a refusal to concede other matters; but of course, they were the ones who decided what to request acquittal for, and what not to. By the very act of not commenting, they all but ensured—unless the judges took it up *proprio motu*—that everything else would be passed through to the defense phase. Concerning the *amici*'s failure to challenge the core theory of liability, Boas notes:

This reticence is curious, given the relative success achieved in respect of the crime base evidence challenged and the dissent of Judge Kwon<sup>[138]</sup> in respect of the accused's lack of genocidal intent. Perhaps the *amici curiae* were concerned that unsuccessful challenges on the accused's actual responsibility might create an undesirable expectation or impression. Perhaps the prosecution can consider itself fortunate this avenue was not pursued further.<sup>139</sup>

Of course, neither an *amicus* nor a defense attorney should necessarily challenge everything. The question on a motion to acquit is not "will the evidence suffice," but "might it suffice if uncontradicted." An actor playing by the rules, as the *amici* were, ought not challenge evidence that, on its face, seems to require a defense—

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same evidence for Count 2 (as three of the five witnesses gave sufficient evidence of forcible transfer). See *id.*

135. *Id.* ¶¶ 161–62; see also Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004), available at [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/040616.htm](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.htm) (summarizing the *amici*'s Motion).

136. *Amici Curiae Motion for Judgement of Acquittal Pursuant to Rule 98bis*, Case No. IT-02-54-T, ¶¶ 161–63 (noting the various charges but then only discussing the genocide counts and stating that "Schedules A-F [which follow] contain only those alleged crimes upon which it is submitted that there is either no evidence or insufficient evidence to sustain the retention of the allegation within the Indictment at this stage").

137. *Id.* ¶ 2.

138. See discussion *infra* Part III.D.2.

139. BOAS, *supra* note 14, at 127–28.

and, as Boas has just noted, it might be strategically unwise to do so. Playing by the rules, however, does not preclude pressing one's advantage; even a cooperative defendant would challenge any evidence that is vulnerable. It is not clear the *amici* conceived of their role this way. For charges concerning the siege of Sarajevo, the *amici* challenged all but one sniping and one shelling allegation; leaving those single allegations in place ensured that, even if the chamber accepted the *amici's* arguments—as it did—the count would survive.<sup>140</sup> It is also questionable whether the *amici's* decision to focus on the legal standards for armed conflict and international conflict in Kosovo and Croatia truly targeted the weak points in the prosecution's case.

This restraint and neutrality, while a professional response to the *amici's* ambiguous structural position between the accused and chamber, undermines the potential utility of the Decision. If the *amici* were in any way constrained by their role—by their lack of an identity of interest with Milošević, then it is less clear to what degree the Decision even represents a robust adjudication of the evidence, at least in the way the tribunal's adversarial process requires. Indeed, the consequences of the *amici's* imperfect identity with the accused are all the more acute precisely because of the adversarial process, for which an identity between defendant and zealous attorney is assumed and essential. A less adversarial process might make the disjuncture between defendant and “friend of the court” less disruptive of the narrative goals of ICL, but that would have required the ICTY to be formed on entirely different principles.<sup>141</sup>

### C. The Prosecution

The prosecution approached the impending conclusion of its case and a possible Rule 98*bis* motion in an atmosphere of doubt;<sup>142</sup> many observers suggested it had failed to assemble a coherent and compelling case, and believed it was likely to secure

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140. See discussion of the Sarajevo counts *infra* Part IV.A.

141. See *supra* note 27 (discussing the adversarial nature of the ICTY). The Chamber itself had tools at its disposal, such as the power to call expert witnesses, but did not use these – itself, perhaps, another example of the implicitly common law style of the Tribunal. See discussion of the Chamber, *infra* Part III.D.

142. The prosecution concluded its case early, without making a closing statement. See Prosecutor v. Milošević, Case No. IT-02-54, Decision on Notification of the Completion of Prosecution Case and Motion for the Admission of Evidence in Written Form (Int'l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004) (discussing the prosecution's filing giving notice of its intent to close its case); Stacy Sullivan, *Muted End to Milosevic Prosecution*, IWPR (Nov. 9, 2005), <http://iwpr.net/report-news/muted-end-milosevic-prosecution>.

conviction only on some counts, but not, critically, on genocide.<sup>143</sup> To these observers, a Decision granting acquittal on even a few counts in its flagship case would have been catastrophic for the prosecution. Still, given its structural position as an integral element of the ICTY, the prosecution could not openly contest the legitimacy of the process; its options, if an adverse decision were handed down, would have been restricted to procedural maneuvers and questioning the wisdom of this particular chamber's reasoning, but within a framework of institutional buy-in that compelled, in public at least, its acquiescence and obedience. For the prosecution, Milošević's strategy of defiant nonchalance was simply not available.

Initially, the prosecution placed its hopes on a Rule 98*bis* motion not being filed at all. Prosecutors could reasonably expect that Milošević would not file one and so their strategy focused on the *amici*. The prosecution objected to letting the *amici* file a Rule 98*bis* motion, on the theory that they were not "a party to the proceedings,"<sup>144</sup> as the Rule requires;<sup>145</sup> either the accused should file, or no one should. This preemptive strategy failed, however, and when the chamber rejected its argument,<sup>146</sup> the prosecution turned to a conventional defense of its case.<sup>147</sup> Its approach was technical and correct, but far less conflicted than the *amici*'s; in its briefs, the prosecution readily conceded the absence or insufficiency of evidence on numerous allegations, while nonetheless urg-

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143. See, e.g., *U.N. Failed in Milosevic Genocide Case, Experts Say*, ASSOCIATED PRESS, Feb. 29, 2004, available at [http://www.sptimes.com/2004/02/29/Worldandnation/UN\\_failed\\_in\\_Milosevi.shtml](http://www.sptimes.com/2004/02/29/Worldandnation/UN_failed_in_Milosevi.shtml) ("When U.N. prosecutors opened their case against Slobodan Milosevic two years ago, they set out to get him convicted of genocide. The consensus today is, they failed. . . . 'The prosecution was underwhelming,' said Michael Scharf."); *Milosevic Likely to be Acquitted on Genocide Charges*, FOXNEWS.COM (Feb. 28, 2004), <http://www.foxnews.com/story/0,2933,112820,00.html> ("Trial-watchers believe the prosecutors built an impregnable case that Milosevic was involved in war crimes in Croatia, Bosnia and Kosovo during the wars of the 1990s that tore apart the Yugoslav federation. But they failed to show an intent to commit genocide, experts said.").

144. Prosecution Motion Under Rule 73(A) for a Ruling on the Competence of the *Amici Curiae* to Present a Motion for Judgement of Acquittal Under Rule 98*bis* ¶ 2, Prosecutor v. Milošević, Case No. IT-02-54-T (Int'l Crim. Trib. for the Former Yugoslavia Feb. 4, 2004).

145. See ICTY R. P. & EVID. 98*bis* (B) (1999) (amended Dec. 8, 2004).

146. Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Prosecution's Motion Under Rule 73 (A) for a Ruling on the Competence of the *Amici Curiae* to Present a Motion for Judgement of Acquittal Under Rule 98*bis*, at 2 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 5, 2004).

147. Prosecution Response to *Amici Curiae* Motion for Judgment of Acquittal Pursuant to Rule 98*bis* ¶ 5, Prosecutor v. Milošević, Case No. IT-02-54-T (Int'l Crim. Trib. for the Former Yugoslavia May 3, 2004).

ing the chamber to maintain all counts.<sup>148</sup> After the Decision came down, the prosecution undertook a rearguard action to preserve the overall scope of the case against which Milošević would have to defend, an action to which we shall return.<sup>149</sup>

#### D. The Chamber

For the chamber, of course, the Decision's legitimacy was not in question; the judges—Robinson, Bonomy, and Kwon<sup>150</sup>—had no interest in minimizing the effects of the Decision they had written. Their concern, rather, would have been with its consequent impact on the remainder of the trial and on the ICTY's jurisprudence and legacy; in particular, they would have an interest in how the Decision affected other Rule 98*bis* proceedings. Like the other actors in the trial, the judges were aware of the Decision's interim function and were not expecting it would turn out to be the most definitive statement they were allowed to make. The judges' subsequent behavior, even before the trial was terminated, suggests they were appalled at the length and comprehensiveness of the document they had produced, and took steps to avoid a repetition.<sup>151</sup>

The most significant tension that arises in connection with the Decision involves the role of judges at the ICTY as the ultimate trier of fact. The Decision discusses at some length the relationship of Rule 98*bis* to the claim of "no case to answer," and indeed, this is yet another example of extensive common law influence on the Rules. Although the Decision is at pains to assert that domestic rules are not to be imported wholesale into the ICTY's jurisprudence, this is precisely what it does with the standard from *R v. Galbraith*.<sup>152</sup> Yet the chamber's rule—though it is directly derived from the common law—produces a very different dynamic with very different implications in the context of a trial at the ICTY.

The chamber discusses the ways in which the Rule 98*bis* procedure derives, but also differs, from the common law motion. Presumably, the reason why the judges felt it important to distinguish

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148. See generally *id.* For example, for Croatia, the prosecution agreed that (1) detention camps listed in ¶ 64(b) (Kumbor) and ¶ 64(f) (Zrenjanin) should be excised from the indictment (part of counts 6 to 13) and (2) Ćelija should be excised from ¶ 71 of the indictment (part of counts 17 to 20). See *id.* ¶¶ 200–02, 218–19.

149. This is discussed at length *infra* Part IV.

150. Judge May had withdrawn from the case the previous month and died shortly thereafter. See Press Release, Int'l Criminal Tribunal for the Former Yugoslavia, Sir Richard May (July 1, 2004), <http://www.icty.org/sid/8402>.

151. See *infra* Part III.D.1.

152. See Gaparayi, *supra* note 121, at 750–51.

Rule 98*bis* from its common law antecedent arises from one of the key structural differences between the ICTY and the common law: namely, the lack of a jury. In the common law, criminal cases are almost always heard before a jury,<sup>153</sup> which is the “trier of fact,” while the judge acts as a supervisory “trier of law.” The chamber notes that “an essential function of the procedure [at common law] is to ensure that at the end of the [p]rosecution’s case[,] the jury is not left with evidence which cannot lawfully support a conviction; otherwise it may bring in an unjust conviction.”<sup>154</sup> At the ICTY, both these roles are vested in the chamber, and the traditional purpose of “no case to answer” is, in a sense, a solution without a problem.<sup>155</sup>

Thus, it is curious that, in describing a circumstance in which the *Milošević* case should continue (namely, if there is evidence that could be sufficient for conviction), the chamber asserts that “[t]his accords with the general principle in common law jurisdictions that a judge must not allow a submission of no case to answer because he considers the prosecution’s evidence to be unreliable, [because] by doing so he would usurp the function of the jury as the tribunal of fact.”<sup>156</sup> As the chamber is the trier of fact, it would only be usurping itself.

Still, well thought out or not, having put this gloss on their own logic, the judges signal that they are *not* signaling their own view about the evidence’s ultimate sufficiency. Unless its express wording indicates something else—unless, in effect, the chamber has arrogated to itself more scope than it is supposed to—the Decision primarily stands for the proposition that the prosecution has not been irremediably incompetent and that it delivered some of what it promised in the initial indictment, at least enough of it to continue.<sup>157</sup>

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153. See Frances Gibb, *First Criminal Trial With No Jury for 400 Years Starts*, TIMES (London), Jan. 13, 2010, <http://business.timesonline.co.uk/tol/business/law/article6984904.ece>.

154. Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶ 11 (Int’l Crim. Trib. for the Former Yugoslavia June 16, 2004), *available at* [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/040616.htm](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.htm).

155. One former ICTY prosecutor notes that “the motion has served more as a tool of trial management, one that allows the Chamber to ‘prune’ cases (historically, quite large) by identifying those portions of the indictment that are not sufficiently supported.” Dermot Groome, *Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?*, 31 FORDHAM INT’L L.J. 911, 963 (2008).

156. *Milošević*, Decision on Motion for Judgement of Acquittal ¶ 13(3).

157. Cf. Prosecutor v. Strugar, Case No. IT-01-42-T, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98*bis*, ¶ 17 (Int’l Crim. Trib. for the Former Yugoslavia June 21, 2004) (“[R]arely, a case will arise where the only evidence in

# 1. The Pointlessness of Rule 98bis—Robinson’s Separate Opinion

Interestingly, even though the Decision discourses at length on the common law rule’s importance in protecting the jury’s role, it does not mention the obvious disjunction that there are no juries at the ICTY; instead, it proceeds immediately to formulate its own rule along the same, common law lines.<sup>158</sup> Only in his separate opinion does Judge Robinson note that “in principle, there is far less danger of an unjust conviction at the Tribunal than in criminal proceedings in common law jurisdictions; there is certainly less need to insulate judges of a Trial Chamber from evidence which can not lawfully sustain a conviction.”<sup>159</sup> Robinson suggests that this difference should provide the basis for modifying the rules “in the transition from their domestic berth to the Tribunal.”<sup>160</sup> He adduces the possibility of a different rule from the ICTY’s different structure: “surely the fact that a Trial Chamber is composed of professional judges, whose need to be insulated from weak evidence is not as great as a lay jury, must make a difference to the application of the no case to answer procedure.”<sup>161</sup>

As it turns out, Robinson’s agenda is to cut back the Rule 98bis proceeding and leave more to the judgment phase:

Charges at the Tribunal are multilayered to a degree that is generally not present in indictments at the domestic level. Thus, a charge could have as many as a hundred or more separate allegations. . . . Is it useful to devote the Tribunal’s resources to an exercise which may result in the elimination of a dozen of these hundred or more individual allegations or details . . . while the charge or count remains intact? Is there any prejudice to an accused in leaving those dozen individual allegations for consideration . . . at the judgment phase?<sup>162</sup>

He therefore suggests constricting Rule 98bis to submissions that are designed to eliminate a charge or count rather than individual allegations of fact relating thereto; in most cases such submissions will relate to a missing legal ingredient of a charge,

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support of a conviction is so inherently incredible that no Trial Chamber could accept its truth.”).

158. The Decision does mention the principle that domestic procedures do not govern the Tribunal and must be modified to fit its Statute and purposes. *See generally* Milošević, Decision on Motion for Judgement of Acquittal.

159. *Id.* ¶ 11 (Robinson, J., concurring).

160. *Id.* ¶ 12.

161. *Id.* ¶ 13.

162. *Id.* ¶ 16.



*e.g., mens rea* . . . [and] that allege that there is *no* evidence, as distinct from *insufficient* evidence, to sustain a charge.<sup>163</sup>

Thus, on Robinson's view, the "no case to answer" process would be radically reduced as a measure of judicial economy and a consequence of judges' greater professional perspective.<sup>164</sup> One might question whether the claim of economy is accurate; although much effort would be saved at the mid-point of the trial, not deciding on specific allegations would mean the defense would feel compelled, strategically, to address them all, since it would not know with certainty whether the judges thought the prosecution's case was strong or weak on any given point. Perhaps Robinson's view is a function of his frustration at having just waded through the entire set of claims and counterclaims for the Rule 98*bis* process. The Decision took months to write, but then he never actually got to the final judgment, when—if his preferred approach had been in place—all those claims would have reappeared.<sup>165</sup>

Robinson focuses on the difference judges' professionalism makes, but surely the more relevant fact is that the Trial Chamber—professional or not<sup>166</sup>—is also the ultimate trier of fact. Concern with usurpation of the jury's function is irrelevant in the unitary model of the ICTY, but not, as Robinson supposes, because of judges' professional skill, rather because of the total identity between judge and jury. It is not the judges' professionalism, but their position, that makes the Rule 98*bis* process pointless.<sup>167</sup>

163. *Id.* ¶ 17.

164. Judge Robinson published an article the following year that argued, among other things, for revision of Rule 98*bis*. See Patrick L. Robinson, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY*, 3 J. INT'L CRIM. JUST. 1037, 1047–49 (2005). In the meantime, his view had prevailed: Rule 98*bis* was amended in December 2004, shortly after the Decision in *Milošević*, and now allows the Chamber "by oral decision and after hearing the oral submissions of the parties, [to acquit] on any count if there is no evidence capable of supporting a conviction." This is Robinson's "whole-count" approach, without the 140-page document. See Press Release, Int'l Criminal Tribunal for the Former Yugoslavia, Judges Amend Rule 73(D) and 98*bis* at Plenary Session (Dec. 10, 2004), available at <http://www.icty.org/sid/8320>.

165. The judgment in the *MOS* trial, involving other members of the same JCE for the Kosovo phase, ran to four volumes. See generally Prosecutor v. Milutinović, Case No. IT-05-87-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009).

166. Some ICTY judges have had little prior trial experience—and less in criminal trials—being diplomatic appointments. See *The Judges*, INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/sid/151> (last visited Apr. 3, 2011). The sleeping judge in the *Elebići* case is notorious. See Jernej Letnar Ćerniè, *What Happens if a Judge Falls Asleep During the Trial?*, INT'L L. OBSERVER (Nov. 14, 2008), <http://internationalallawobserver.eu/2008/11/14/what-happens-if-a-judge-falls-asleep-during-the-trial>.

167. In his Partial Dissenting Opinion in *Jelisić*, Judge Fausto Pocar draws this point: since the judges are the "final arbiters . . . [t]here is no point in leaving open the possibility that another trier of fact could come to a different conclusion" and "[t]herefore, if at the

## 2. Predictive Asymmetry in the Decision—Kwon's Dissent

The Decision preserved all the counts against Milošević, but Judge Kwon appended a short dissenting opinion concerning the charge of genocide under a JCE I theory. Genocide under JCE I requires a showing that an accused actually possessed the special intent necessary to commit genocide himself, rather than imputing it or finding that he had “taken” the intent of his co-perpetrators. The Decision accepted that the prosecution had supplied sufficient evidence of Milošević's own intent to allow the trial to continue on that charge, but Kwon dissented: “I do not agree with the majority that there is sufficient evidence upon which a Trial Chamber could find beyond reasonable doubt that the Accused had the *dolus specialis* required for genocide.”<sup>168</sup> Kwon did not dissent on other theories, such as JCE III, aiding and abetting or complicity, or genocide as a superior under Article 7(3), which contemplate liability even if an accused merely knows about or foresees genocidal harm, but he did not believe it was reasonable to infer Milošević's own intent from that evidence.<sup>169</sup>

Kwon's dissent does not affect the material outcome of the Decision—no counts were dropped—but it does delimit some elements of a putative final judgment, because of the asymmetrical information embedded in a Rule 98*bis* decision. Denial of a motion continues the trial without prejudice, but acquittal has a clear, incontrovertible meaning. We cannot know how the other two judges would ultimately have ruled on the question of JCE I liability—it is possible they were convinced of Milošević's guilt or of his innocence, yet were determined to follow the correct procedure—but unless there was new evidence introduced in the defense phase, we can be certain about Kwon. Commenting on the dissent, Boas says “a considerable question mark was left hanging over this crucial and emotive aspect of the prosecution's case in respect of Bosnia—that Milošević had the specific intent to commit genocide

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close of the prosecution case, the judges themselves are convinced that the evidence is insufficient, then the Chamber must acquit.” He concludes by asking, “what is the point in continuing the proceedings if the same judges have already reached the conclusion that they will ultimately adopt at a later stage?” Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, at 71, ¶ 6 (Int'l Crim. Trib. for the Former Yugoslavia July 5, 2001) (Pocar, J., dissenting in part). It is ironic that it took a judge from the civil law tradition to point this out.

168. *Milošević*, Decision on Motion for Judgement of Acquittal at 140, ¶ 1 (Kwon, J., dissenting in part).

169. *Id.* ¶ 2.

in Srebrenica and elsewhere.”<sup>170</sup> This is diplomatically phrased; under the logic of Rule 98*bis*, it is difficult to see how Kwon could *not* have acquitted for genocide on any theory requiring the defendant himself to have actual genocidal intent instead of mere knowledge or foreseeability of the risk. On any count depending on the JCE I theory, at least, Kwon could only have acquitted or dissented.

Though neither they nor anyone else could know it then, the Decision was—or rather turned out to be—the last major statement by the judges on the evidence. In time, and with the turn of events, this made the Decision into something more than its authors originally anticipated. Its appeal as a source for narrating the events of the Yugoslav wars turned out to be as considerable as it was doctrinally implausible—for the very thing that is so poorly thought through in the Decision, the very feature that makes the Rule 98*bis* procedure pointless, is the same feature that later made it seemingly attractive for the authoritative narrative theory.

It is precisely the identity of interest—indeed, the total identity—between the trier of fact and the trier of law at the ICTY that makes the Decision potentially appealing. A decision to continue a case at the ICTY might be thought to signal a likely final outcome with marginally greater confidence than does a similar decision in the common law because the trier of law and fact are one and the same. It is entirely possible for a juror to think, “Well, the judge says let the case continue, but I already know how I’ll rule;” because the common law judge is a separate actor, there is simply no information in his decision about the jury’s view. By contrast, the judges hearing a Rule 98*bis* motion are the same ones who will decide the case; thus, depending on what exactly their decision says, it might indicate a great deal about their ultimate view. After all, Kwon certainly would have opposed conviction on a specific count—so why not look for similar indications elsewhere, perhaps in the opposite direction? It was, and is, tempting to suppose one could read a great deal about the meaning of a terminated trial into what was, initially and structurally, an interim pronouncement. But as almost everyone who attempted to use the Decision this way was compelled to conclude, and as we shall see, this seeming value is defective and deceptive.

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170. BOAS, *supra* note 14, at 126.

#### IV. A POTENTIAL FOR AMBIGUITY: CONTEMPORARY RESPONSES TO THE DECISION

The moment for this potential role's realization lay two years in the future, however. First, and more pressing, were the parties' strategic responses to the Decision as the interim declaration it was designed to be. The immediate outcome of the Decision was what one observer calls a "zero effect[:]"<sup>171</sup> hundreds of allegations dropped, but all counts still in place. Immediately after the Decision issued, the parties had to busy themselves with preparations for continued trial. The chamber appointed the *amici* as assigned counsel, a move Milošević contested, and they each, in part, continued the defense.<sup>172</sup> The prosecution's response to the Decision was more complex.

##### A. Denying Effect—The Prosecution's Redline Indictments

The prosecution, having failed to prevent the motion and Decision, made efforts within the framework of the trial to contextualize the damage to its case. The chamber instructed the prosecution to produce redline indictments that indicated which allegations were no longer part of the case.<sup>173</sup> New versions for Bosnia and Croatia were produced, but not for Kosovo because no allegations were affected.<sup>174</sup> The new versions are mostly sober, technical realizations of the chamber's instructions, but the prosecution also added comments that explain or justify marginal calls, calls which inevitably preserved allegations.

The prosecution defended certain allegations against removal on the grounds that the *amici* did not specifically challenge them, even though they were plausibly covered by the chamber's findings.<sup>175</sup> The *amici* had challenged many allegations in the large Schedules attached to the indictment, but generally did not challenge the general allegations in the main text itself, and the prosecution deployed this fact to preserve mention of specific

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171. Gaparayi, *supra* note 121, at 766.

172. See *supra* Part II.A.

173. Prosecutor v. Milošević, Case No. IT-02-54-T, Order to Prosecution on Indictments following Rule 98bis Decision, at 2 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2004).

174. Prosecution's Submission of Red-Lined Versions of Indictments Pursuant to Trial Chamber "Order to Prosecution on Indictments Following Rule 98bis Decision" ¶ 3, Prosecutor v. Milošević, Case No. IT-02-54-T (Int'l Crim. Trib. for the Former Yugoslavia Aug. 11, 2004).

175. *Id.* ¶ 7(c)–(d).

municipalities in the main text for several counts.<sup>176</sup> In terms of interpreting the Decision, that the *amici* did not challenge certain items of evidence with adequate specificity—on the prosecution's reading—ultimately tells little about what the chamber thought about those items. It simply raises, again, the question of the *amici*'s role and their imperfect identity of interest with the accused.

Similarly, for a persecutions count from Bosnia,<sup>177</sup> the chamber ruled that allegations for three named municipalities in the Schedules lacked evidence. Nonetheless, the prosecution did not line them out in the main text, arguing that “[i]n the Prosecution's opinion[,] findings of insufficient evidence in relation to the Schedules of the Bosnia Indictment do not necessitate the deletion of [those] municipalities . . . as the allegations contained in paragraphs 33-35 are broader than the specific allegations contained in the Schedules.”<sup>178</sup>

The most striking changes are to the Sarajevo sniping and shell-ing counts. For both of these counts, the chamber ordered acquittal on all specific incidents alleged except one each: the shooting of Seid Solak, a thirteen-year-old boy wounded in the abdomen, and the notorious Markale incident that killed sixty-six people.<sup>179</sup> These were also the only incidents not challenged by the *amici*.<sup>180</sup>

176. *Id.* ¶ 7(b)–(d). On the locations in which genocide was alleged, Boas has a succinct discussion of the complicated transit from the original fourteen pleaded to seven, with the court acquitting in one. Boas, *supra* note 14, at 124–26.

177. This was Count 3. *Id.* ¶ 7(b).

178. *Id.* ¶ 7(b) n.4 (“The Prosecution did not lead all of its evidence regarding . . . persecutions in this municipality because of limitations on time. The Prosecution relies primarily on the expert reports of [three named experts] to meet their burden of proof.”). Prior indications of this strategy appear in the pre-Decision brief. Prosecution Response to Amici Curiae Motion for Judgment of Acquittal Pursuant to Rule 98bis ¶ 5, Prosecutor v. Milošević, Case No. IT-02-54-T (Int'l Crim. Trib. for the Former Yugoslavia May 3, 2004) (“Where the *Amici* submit that no evidence . . . has been led of crimes set out in Schedules A-F . . . the Prosecution takes the challenge to relate to the crimebase evidence. In respect of the responsibility of the Accused for the crimes in question, the Prosecution refers generally to the evidence as summarized in [the three reports] which goes to establishing the responsibility of the accused for the remaining crimes in the indictment, and to which the Motion does not refer specifically.”). In their brief, the *amici* had not said anything specific about paragraphs 33–35 of the indictment. See generally Amici Curiae Motion for Judgment of Acquittal Pursuant to Rule 98bis, Prosecutor v. Milošević, Case No. IT-02-54-T (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2004).

179. Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶¶ 310–15 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004), available at [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/040616.htm](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.htm).

180. It is not clear why only these two incidents were not challenged. The *amici*'s brief does not discuss any evidence for them (unless it is in the confidential annexes), nor does the prosecution's (because they were not challenged). See generally Amici Curiae Motion

the other forty-three sniping incidents and twenty-six shelling incidents alleged were, and the prosecution, conceding that these incidents lacked specific supporting evidence, had unsuccessfully submitted that “‘overview evidence’ of a shelling and sniping campaign in Sarajevo . . . is sufficient” for a conviction.<sup>181</sup>

Still, although it had to line out all these incidents, the prosecution was able to preserve the entire chapeau, describing the

killing and wounding [of] thousands of civilians of all ages and both sexes . . . an extensive, four-month shelling and sniping attack . . . a protracted campaign of shelling and sniping . . . [against] civilians who were, amongst other things, tending vegetable plots, queuing for bread or water, attending funerals, shopping in markets, riding on trams, [and] gathering wood.<sup>182</sup>

The chapeau even continues to note that “[s]pecific instances of sniping are described in Schedule E attached to this indictment. Specific instances of shelling are set forth in Schedule F.”<sup>183</sup> When one reads these schedules now, these instances are still set forth, but with lines through them. No changes are made to the text of the indictment itself, however, and anyone reading the indictment would not notice anything.

The prosecution also preserved the seven overlapping counts—characterizing the sniping and shelling as murder (a crime against humanity and a violation of the laws or customs of war); inhumane acts (a crime against humanity); willful killing (a grave breach); willfully causing great suffering (a grave breach); cruel treatment (a violation of the laws or customs of war); and attacks on civilians (a violation of the laws or customs of war)<sup>184</sup>—all above an allegation set that now consisted of just one incident each of sniping and shelling. This is entirely correct—it is possible to characterize a single incident in multiple ways, and to base a count on allegations in the main text rather than the schedules—but it is also extraordi-

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for Judgement of Acquittal Pursuant to Rule 98bis, Prosecutor v. Milošević, Case No. IT-02-54-T (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2004); *Prosecution Response to Amici Curiae Motion for Judgment of Acquittal Pursuant to Rule 98bis*, Case No. IT-02-54-T. The Markale shelling, however, killed many more people than any other incident and had been subjected to extensive review concerning the direction from which the shell had been fired.

181. *Milošević*, Decision on Motion for Judgement of Acquittal ¶ 313; see also *Prosecution Response to Amici Curiae Motion for Judgment of Acquittal Pursuant to Rule 98bis*, Case No. IT-02-54-T, ¶ 484.

182. Prosecution’s Submission of Red-Lined Versions of Indictments Pursuant to Trial Chamber, Prosecutor v. Milošević, Case No. IT-02-54-T, attach. B, ¶¶ 43–45 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 11, 2004).

183. *Id.* attach. B, ¶ 45.

184. *Id.*

narily hollowed out. Because the chamber did not consider the prosecution's "overview evidence" sufficient to preserve the other forty-three sniping and twenty-six shelling allegations, what exactly remained aside from the single pleaded instance of each? Yet, the formal outcome—the preservation of all counts, and of the original text—masks this, leaving the impression that nothing of substance has changed and that no doubt or qualification has entered the juridical calculus.

The prosecution encourages this impression by suggesting that the redline indictments are not amended indictments at all, but only

working documents of value to clarify the case that the Defense has to meet. It may be thought that the Croatia and Bosnia Indictments should remain unchanged from the moment that the Prosecution case closed in order to best assist the parties and the public to be able to assess what was alleged, what was the subject of acquittal by the Trial Chamber and what (if any) counts are the subject of convictions in due course.<sup>185</sup>

This is unobjectionable in a technical sense, but it also asserts a mystifying continuity between the original indictment, which contained allegations on which Milošević had been acquitted, and the subsequent revision. More generally, the mere presence of the prosecution's explanatory notes, when a simple redaction without comment could have been done, suggests an effort to frame the outcome to their advantage. The effect is not so much to delegitimize the Decision—this is hardly a plausible public strategy for the prosecution—as to contextualize it, seeking to preserve and insulate as much of the prosecution's case as possible. At the time, this was done in order to preserve options for trial, but later it would serve a different purpose.

#### B. *Summaries of Judgment—Contemporary Reactions to the Decision*

Apart from the parties' strategic responses in the courtroom, outsiders had to consider how to present the Decision. One understandable tendency was to compress the enormous and tedious<sup>186</sup> ruling into a shorter and simpler text, but with an unfortunate effect: The special meaning the Decision attaches to the phrase

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185. *Id.* ¶ 4.

186. Large sections of the Decision consist of charts summarizing particular allegations challenged by the *amici*, the prosecution's response, and the chamber's disposition. Without the underlying briefs and evidence for reference, these anodyne recitations convey all the analytical depth of an "am not/are so" dispute. See *Milošević*, Decision on Motion for Judgement of Acquittal at 111–29.

“sufficient evidence” drops out, leaving the impression that the chamber has carefully reviewed and accepted the prosecution’s claims of guilt, full stop.

Recall that in applying the Rule 98*bis* standard, the judges are asking whether any reasonable court could find the evidence, if taken at its highest, sufficient for conviction.<sup>187</sup> They note this standard early in the Decision, indicating that it applies throughout the 140 pages that follow: “When, in reviewing the evidence, the Trial Chamber makes a finding that there is sufficient evidence, that is to be taken to mean that there is evidence on which a Trial Chamber could be satisfied beyond reasonable doubt of the guilt of the accused.”<sup>188</sup> This qualifier applies to every conclusion upholding a count or allegation. The judges, understandably, did not write it out each time, but the consequence was that contemporary reports of the Decision cite its findings in ways that suggest that *this* Trial Chamber found the prosecution’s case plausible or persuasive.

These elisions do not appear willful or egregious, and in many instances, observers get it about right, in part. A U.N. press release from June 17, 2004, for example, refers to the chamber’s “dismiss[ing] a legal motion . . . after finding there is enough evidence for him to answer.”<sup>189</sup> Later, though, the text starts to cut corners—much as the judges themselves did in the Decision’s disposition:

In dismissing the motion . . . the ICTY rejected several submissions regarding Bosnia. The judges found that there is enough evidence to show that there was a joint criminal enterprise . . . to destroy part of Bosnia’s Muslims as a group; that Mr. Milošević was part of the enterprise; and that the enterprise committed genocide.”<sup>190</sup>

Anyone copying text from the Decision’s disposition could reach this misleading conclusion because the judges’ qualifier for “enough evidence” appears over 300 paragraphs earlier.

Other examples extend this shortcut analysis. A summary in *International Legal Materials (ILM)* (derivative of the Trial Chamber’s own summary) characterizes the Decision in words that sug-

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187. See *supra* Part II.C (discussing the standard of review).

188. Milošević, Decision on Motion for Judgement of Acquittal ¶ 13(7).

189. Press Release, United Nations, UN War Crimes Tribunal Dismisses Bid to Acquit Milošević (June 16, 2004), available at <http://www.un.org/apps/news/story.asp?NewsID=11068&Cr=ICTY&Cr1=>.

190. *Id.*



gest the chamber actually made factual findings of guilt against Milošević:

[W]ith respect to the *Amici Curiae* submissions concerning genocide in Bosnia, the Trial Chamber dismissed the motion. Consequently, the Trial Chamber held: (1) there was sufficient evidence of a joint criminal enterprise, which included members of the Bosnian Serb leadership, the aim and intention of which was to destroy a part of the Bosnian Muslims as a group; (2) Slobodan Milosevic was a participant in that joint criminal enterprise; (3) Slobodan Milosevic was a participant in a joint criminal enterprise, which included members of the Bosnian Serb leadership, to commit crimes other than genocide and it was reasonably foreseeable to him that, as a consequence of the commission of those crimes, genocide would be committed by other participants in the joint criminal enterprise, and it was committed; (4) Slobodan Milosevic aided and abetted or was complicit in the commission of the crime of genocide in that he had knowledge of the joint criminal enterprise, and that he gave its participants substantial assistance, being aware that its aim was the destruction of a part of the Bosnian Muslims as a group; and (5) Slobodan Milosevic was a superior to certain persons whom he knew or had reason to know were about to commit or had committed genocide of a part of the Bosnian Muslims as a group, and he failed to take the necessary measures to prevent the commission of genocide, or punish the perpetrators thereof.<sup>191</sup>

A plain reading of the *ASIL* note suggests the chamber actually held that Milošević was a participant in two joint criminal enterprises, and aided and abetted or was complicit in genocide. The chamber held nothing of the kind. Although the Decision uses almost identical language in its disposition,<sup>192</sup> it does so with implicit reference back to the qualifying language, which drops out of the *ASIL* summary.

No one with legal training, or even good sense, reading these reports would be confused in some absolute way—the same reports also make clear that the trial continues. Nor is it likely that this

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191. *International Law in Brief: International Criminal Tribunal for the Former Yugoslavia (ICTY) (Trial Chamber III): Prosecutor v. Milošević*, AM. SOC'Y INT'L L. (June 25, 2004), <http://www.asil.org/ilib0711.cfm#7>.

192. Critically, the Decision places "sufficient evidence" outside the first point, where it modifies all five tentative findings, while the *ILM* summary moves it inside, where it modifies only the first. *Compare Milošević*, Decision on Motion for Judgement of Acquittal ¶ 323 ("[T]he Trial Chamber . . . holds that there is sufficient evidence that (1) there existed a joint criminal enterprise"), with *International Law in Brief: International Criminal Tribunal for the Former Yugoslavia (ICTY) (Trial Chamber III): Prosecutor v. Milošević*, *supra* note 191 ("[T]he Trial Chamber held: (1) there was sufficient evidence of a joint criminal enterprise").

represents aggressive spin, because at the time—a mere week or so after the Decision—the authors surely expected that the trial would continue. Still, the language is there—or rather, *not* there—and at the very least, we recognize bad drafting and laziness, in the otherwise cautious, dry language of an *ILM* summary, and perhaps a kind of conceptual heuristic.<sup>193</sup> At the time, the Decision predictably receded into the background, as its most consequential element—the continuation of the trial on all counts—took clear precedence. This linguistic and conceptual shortcut—which rendered “sufficient evidence” without the chamber’s own more cautious definitional qualifier, allowing a reading vindicating the prosecution’s case—would reappear in the discourse after the Decision re-emerged.

#### V. THE POTENTIAL OF AMBIGUITY: INVOKING THE DECISION AFTER MILOŠEVIĆ’S DEATH

On March 11, 2006, Milošević died, and, within days, proceedings were terminated.<sup>194</sup> With his death the interim Decision, whose formal function had already been perfected in the redefined, redlined contours of the defense stage, unexpectedly became the chamber’s last significant utterance on the evidence. A document whose continuing significance, apart from defining the scope of other Rule 98*bis* hearings, would ordinarily be superseded by final judgment, suddenly regained a potential prominence in the vacuum of frustrating indecision and inarticulation. For some, it became a kind of judgment.

Different actors have deployed a variety of strategies for exploiting the Decision’s potential for meaning and authority. In general, these strategies treat the discussion in the Decision as dispositive of some question, though they do so in very different ways. In some strategies, this involves careful mining of dicta; for example, by citing the chamber’s discussion of a legal standard it used to assess the evidence; elsewhere, following the approach seen when the

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193. There was certainly no reason descriptions had to be skewed this way. Human Rights Watch’s review of the terminated case produced an admirably accurate summary of the Decision, noting that it preserved each count based on evidence that “if accepted, and in the absence of a defense case, a reasonable trier of fact could find sufficient to sustain a conviction,” but also that there was not enough evidence to sustain “all of the factual allegations relating to all of the crime scenes included in the indictments.” HUM. RTS. WATCH, *supra* note 64, at 13.

194. Prosecutor v. Milošević, Case No. IT-02-54-T, Order Terminating the Proceedings, at 2 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 14, 2006), available at [http://www.icty.org/x/cases/slobodan\\_milosevic/tord/en/060314.htm](http://www.icty.org/x/cases/slobodan_milosevic/tord/en/060314.htm).

Decision was first issued, the cautionary qualifier to the phrase "sufficient evidence" is read out, implying that the evidence actually *was* sufficient. These approaches, to which we first turn, either advance a claim of quasi-judgment or make arguments for re-deploying *Milošević's* "sufficient evidence" in other legal contexts.

Logic and doctrine tell us that, except where it acquits, the Decision has no dispositive or authoritative value whatsoever. Not all who read and write are logical or exacting about doctrine, however, and a realist, or realistic, assessment of the Decision's effects must take into account uses that are compelling, even if not up to code.<sup>195</sup> The uses to which the Decision has been put suggest there is marginally more scope for deploying its characterizations of the state of the law than its descriptions of factual evidence, but even the latter is available. The Decision's deployment in other cases, and by other courts, however doctrinally suspect, is its own proof of influence. Still, the evident doctrinal weakness of these uses exercises its own constraint on the Decision's utility as an ersatz judgment. Normally, realism encourages skepticism towards doctrine and "correct" answers, but here we see how doctrine constrains the uses for which the Decision can be plausibly deployed; not just any argument will do.

#### A. *Characterizing the Decision as Judgment— Del Ponte's Press Conference*

In her press statement following Milošević's death, Chief Prosecutor Carla Del Ponte expressly invoked the Decision in the context of a mountain of evidence and a nearly completed trial:

I deeply regret the death of Slobodan Milosevic. It deprives the victims of the justice they need and deserve. . . . During the prosecution case, 295 witnesses testified and 5000 exhibits were presented to the court. This represents a wealth of evidence that is on the record. After the presentation of the prosecution case, the Trial Chamber, on 16 June 2004, rejected a defense motion to dismiss the charges for lack of evidence, thereby confirming, in accordance with Rule 98*bis*, that the prosecution case contains sufficient evidence capable of supporting a conviction on all 66 counts. The Defense was given the same amount of

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195. Richard A. Matasar, *Treatise Writing And Federal Jurisdiction Scholarship: Does Doctrine Matter When Law Is Politics?*, 89 MICH. L. REV. 1499, 1508 n.30 (1991) ("[R]ealist legal analysis recognizes multiple possible answers to legal problems. From deciding what a case means, to understanding the factual content of either a dispute or the precedents that might govern that dispute . . . legal analysts must exercise judgment. . . . [R]ealists seek to explain the development of law through many external factors—political, cultural, ideological.").

time as the prosecution to present its case. There were in total 466 hearing days. 4 hours a day. Only 40 hours were left in the Defense case, and the trial was likely to be completed by the end of the spring.<sup>196</sup>

Almost everything here is accurate;<sup>197</sup> the fact of the trial's termination is not hidden.<sup>198</sup> The statement is also presented from a perspective and for a purpose, and in that context, the Decision acquires an aura of considerably greater finality on March 12, 2006 than presumably even Del Ponte would have assigned it just the morning before, let alone when it was issued. The claim that the trial was nearly over, besides heightening the poignancy and sense of waste, also asserts a finality near to final judgment. Everything needed was available—just a few hours were missing. This is a half-truth: “40 hours” did not count time for cross-examination or administration, let alone delays, and at the rate things had been going, the trial would have continued for a few months, after which there would have been a delay of six months to a year for the final judgment to be issued, at any point during which his death would have terminated proceedings; and, of course, presumably both sides would have appealed.<sup>199</sup> Yet what is interesting is the implication: conclusion and judgment were so near that it is possible for observers to draw their own opinion from the trial process.<sup>200</sup> Del

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196. *Press Conference of the ICTY Prosecutor*, WAR CRIMES PROSECUTION WATCH (Mar. 12, 2006), [http://www.publicinternationallaw.org/warcrimeswatch/archives/wcpw\\_vol01issue03.html](http://www.publicinternationallaw.org/warcrimeswatch/archives/wcpw_vol01issue03.html).

197. It was not the defense, but the *amici*, who brought the motion; nor did they press for acquittal on “the charges,” but only certain counts. *See supra* Part II.B. This may be simply a slip—and an understandable one, in light of the subsequent appointment of the *amici* as defense counsel—though the prosecution’s opposition to Milošević’s self-representation was endemic, and there is at least inadvertent advantage in suggesting that Milošević had brought the motion and been rejected. With this slip or elision, the imperfect identity of the *amici* and Milošević—with all it implies for the value of the Decision in an adversarial system—disappears.

198. Thus, Del Ponte continued: “It’s a great pity for justice that the trial will not be completed and no verdict will be rendered.” *Press Conference of the ICTY Prosecutor*, *supra* note 196; *cf.* Simons & Crouch, *supra* note 68 (“Ms. Hartmann, Ms. Del Ponte’s spokeswoman, expressed frustration that at least in a legal sense, Mr. Milosevic would not go down in history as a convicted war criminal. ‘This is bad for proving the real responsibility of Mr. Milosevic,’ she said. ‘There is a presumption of innocence, and now we will not get a conviction.’”).

199. *See* Boas, *supra* note 14, at 1 (“[D]espite *ex post facto* statements by the prosecution that its end was only weeks away, in reality it was some months away from being concluded, and yet many more months from a judgement being rendered.”).

200. *See* Naqvi, *supra* note 29, at 247 (“[T]he lack of a judgment has not deprived the four-year trial from achieving some of its objectives, in particular that of satisfying to some extent the right to the truth or setting down a historical record. The question that remains is whether a legal judgment is necessary to accord such evidence the status of representing ‘the truth.’”).

Ponte simultaneously acknowledges what she must—that technically there will be no verdict—and claims that nonetheless there can be.<sup>201</sup>

Considering the prosecution's earlier, assiduous efforts to render the Decision as invisible and inconsequential as possible, its very public invocation by the chief prosecutor in the wake of the trial's termination is ironic. More, however, it suggests the prosecution understood the strategic possibilities inherent in the document—certainly the Decision's potential to lend an ersatz air of finality, and perhaps also, if only implicitly, its attractive potential to do the things final judgments are thought to do in constructing narratives—even as it too understood, and was compelled to acknowledge the Decision's doctrinal limitations.

B. *Treating the Decision like a Judgment—The ICJ's  
Bosnian Genocide Case*

Just under a year after the death of Milošević, the International Court of Justice (ICJ) rendered its judgment in the genocide case brought by Bosnia against Serbia and Montenegro.<sup>202</sup> In part, this case had acquired an even greater emotional and political salience as an implicit second chance to demonstrate Milošević's responsibility. Thus, when the ICJ ruled that Serbia had not committed genocide,<sup>203</sup> its failure to acquire and consider all the evidence

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201. The tribunal, by contrast, was cautious in its response to Milošević's death, neither mentioning the Decision nor advancing it as substantive alternative to judgment. Yet, it, too, sought to place the termination of the case in a broader context that implicitly emphasized its continuing availability as a venue for an accounting of the broader conflict:

I would like to restate that the Tribunal regrets Slobodan Milosevic's death and the fact that the case against him will not be brought to judgement. We recognize that this case was an important one. However, it is not the only important case that the Tribunal's judges have before them. We continue to try the highest-level persons accused of perpetrating the most serious crimes against Serb, Croat, Bosnian Muslim, Albanian and other victims in the former Yugoslavia.

Press Release, Int'l Criminal Tribunal for the Former Yugoslavia, Update from the President on the Death of Slobodan Milosevic (Mar. 17, 2006). The President at the time was Judge Pocar.

202. See Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 91 (Feb. 26), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>. The identities of the states party have a complicated history. The Applicant, the Republic of Bosnia and Herzegovina became Bosnia and Herzegovina on December 14, 1995. The Respondent, the Federal Republic of Yugoslavia, became the State Union of Serbia and Montenegro on February 4, 2003; after the dissolution of that union on June 3, 2006, Montenegro was no longer a party to the case, leaving only the Republic of Serbia. See *id.* ¶¶ 76–77.

203. See *id.* ¶¶ 413–15. The International Court of Justice (ICJ) did find that Serbia had violated its obligations under the Genocide Convention by failing to prevent the genocide in Srebrenica in July 1995, having failed to transfer Ratko Mladić for trial by the ICTY,

from *Milošević*—in particular, the minutes of the FRY's Supreme Defense Council, thought to be a potential smoking gun for proving the senior Belgrade leadership's special intent and knowledge—became a focus for frustration.<sup>204</sup> Although an independent court, the ICJ acknowledged the "unusual feature" that "[m]any of the allegations before this Court have already been the subject of the processes and decisions of the ICTY."<sup>205</sup> But what, if anything, could the ICJ have done with the *Milošević* chamber's review of evidence in the Decision?

Although not a criminal jurisdiction, the ICJ applied a standard of proof of similar seriousness: "claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive."<sup>206</sup> In its judgment, the ICJ considers at length the

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and having failed fully to cooperate with the tribunal. See *id.* ¶ 471. The ICJ identifies the perpetrators of genocide at Srebrenica as "members of the VRS [*Vojaska Republike Srpske*, the Bosnian Serb Army], *id.* ¶ 297, which is all consistent with the ICTY's jurisprudence.

204. See, e.g., Jens David Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14 UCLA J. INT'L L. & FOREIGN AFF. 77, 98 (2009) ("The story [concerning the Supreme Defense Counsel documents] highlights perfectly the complex tensions between the collective truth of history and the individual truth of a single defendant's culpability."); Marlise Simons, *Genocide Court Ruled for Serbia Without Seeing Full War Archive*, N.Y. TIMES, Apr. 9, 2007, <http://www.nytimes.com/2007/04/09/world/europe/09archives.html> ("Lawyers interviewed in The Hague and Belgrade said that the outcome might well have been different had the International Court of Justice pressed for access to the full archives, and legal scholars and human rights groups said it was deeply troubling that the judges did not subpoena the documents directly from Serbia."); Ruth Wedgwood, *Slobodan Milosevic's Last Waltz*, N.Y. TIMES, Mar. 12, 2007, ("[I]n trying to meet [its evidentiary] standard, the court declines to draw any adverse inference against Belgrade, even though the documents it turned over to the court were heavily redacted.")

205. *Application of Convention on the Prevention and Punishment of the Crime of Genocide*, 2007 I.C.J. 91, ¶ 212.

206. *Id.* ¶ 209 (comparing *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 244 (Apr. 9)). The ICJ's standard was controversial. See Berglind Halldórsdóttir Birkland, *Reining in Non-State Actors: State Responsibility and Attribution in Cases of Genocide*, 84 N.Y.U. L. REV. 1623, 1641–42 (2009) ("While the Court's imposition of this onerous standard of proof was driven by the commendable desire not to take genocide lightly, it is important to remember that state responsibility under the Genocide Convention . . . is civil, not criminal, in nature. . . . This onerous standard—when combined with a strict attribution test and a refusal to consider circumstantial evidence of intent—raised the threshold high enough effectively to shut the door on most complaints under the Genocide Convention."); Theodor Meron, *Breaking Developments in International Law: A Conversation on the ICJ's Opinion in Bosnia and Herzegovina v. Serbia and Montenegro*, 101 AM. SOC'Y INT'L L. PROC. 215, 216 (2007) ("This sounds a lot to me like the reasonable doubt standard and the requirement that guilt be the only reasonable inference from the facts. . . . The ICJ's decision to apply such a high standard of proof is noteworthy. Because of the egregious criminality of genocide and the serious implications of a determination that the state is responsible for genocide, it is perhaps reasonable for the court to apply standards of proof that are rather higher than the normal standard of balance of probabilities. But, should the court apply standards as high as in a criminal case? . . . One of the problems here is that the court has no provision in the Statute or Rules on the burden of proof and its shaping of evidential rules as it goes

value of evidence from ICTY cases, as well as the jurisprudence of the ICTY itself.<sup>207</sup> It considers the ICTY's "fact-finding process" to be of the kind that "falls within [its preferred] formulation, as 'evidence obtained by examination of persons directly involved,' tested by cross-examination, the credibility of which has not been challenged subsequently."<sup>208</sup>

The parties to *Bosnian Genocide* were in broad, if strategic, agreement on the value of the ICTY. The Applicant, Bosnia, had relied on ICTY material throughout the proceedings, introducing evidence from a variety of documents, including indictments—a strategy consistent with a broader view of probative value than the ICJ seemed prepared to accept.<sup>209</sup> The Respondent, Serbia, had at first, "challenged the reliability of the Tribunal's findings, the adequacy of the legal framework under which it operates, the adequacy of its procedures and its neutrality"<sup>210</sup>—a view similar to Milošević's. By the time oral proceedings were held, however, Serbia had adopted an approach closer to that of a cooperating defense attorney or *amicus*: it accepted the jurisprudence of the ICTY, but noted:

[W]e do not regard all the material of the [ICTY] as having the same relevance or probative value. We have primarily based ourselves upon the judgments of the Tribunal's Trial and Appeals Chambers, given that only the judgments can be regarded as establishing the facts about the crimes in a credible way.<sup>211</sup>

The ICJ then expressly discusses the evidentiary value of Rule 98*bis* decisions.<sup>212</sup> The ICJ accurately paraphrases the *Jelisić* (and *R. v. Galbraith*) standard that such decisions only mean a court could convict, not that it would, and notes that, in *Krajišnik*, the chamber ultimately acquitted on genocide after having dismissed a Rule 98*bis* motion.<sup>213</sup> The ICJ then draws the critical conclusion,

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along with a particular case does not give parties advance notice as to what is expected of them.").

207. *Application of Convention on the Prevention and Punishment of the Crime of Genocide*, 2007 I.C.J. 91, ¶¶ 214–24.

208. *Id.* ¶ 214.

209. *Id.* ¶ 217.

210. *Id.* ¶ 215.

211. *Id.* ¶ 215. The ICJ implies that Serbia's shift was strategic, taken because the ICTY had yielded only limited convictions for genocide, and had not convicted any Belgrade officials. *Id.*

212. *Id.* ¶ 219 (calling them "motions for acquittal made by the defence . . . after the defence has had the opportunity to cross-examine the prosecution's witnesses"). Note the reference to motions brought by "the defence," rather than, as in *Milošević*, an *amicus*.

213. *Id.*

which is equally valid for indictments and Rule 98*bis* decisions: "Because the judge or the Chamber does not make definitive findings . . . the Court does not consider that it can give weight to those rulings. The standard of proof which the Court requires in this case would not be met."<sup>214</sup> The ICJ accepted Serbia's position rather than Bosnia's in holding that evidence from the ICTY is not enough, and interim evaluations are not enough; only final judgments are definitive.<sup>215</sup>

Having set the bar high, the ICJ promptly limbos under it, and cites the Decision several times. In deciding if members of a group protected under the Genocide Convention were killed, in regard to the Luka Camp, the ICJ says the following:

In the *Milošević* Decision on Motion for Judgment of Acquittal, the Trial Chamber found that many Muslims were detained in Luka camp in May and June 1992 and that many killings were observed by witnesses, it held that "[t]he conditions and treatment to which the detainees at Luka Camp were subjected were terrible and included regular beatings, rapes, and killings." "At Luka Camp . . . The witness personally moved about [twelve to fifteen] bodies and saw approximately 100 bodies stacked up like firewood at Luka Camp; each day a refrigerated meat truck from the local Bimeks Company in Brèko would come to take away the dead bodies."<sup>216</sup>

Three paragraphs later, they reach their finding:

On the basis of the facts set out above, the Court finds that it is established by overwhelming evidence that massive killings in specific areas and detention camps throughout the territory of Bosnia . . . were perpetrated during the conflict. . . . The Court thus finds that it has been established by conclusive evidence that massive killings of members of the protected group occurred and that therefore the requirements of the material element . . . are fulfilled.<sup>217</sup>

Similarly, the ICJ invokes the Decision to discuss the Manjaca Camp in deciding if Serbia "caus[ed] 'bodily or mental harm' within the meaning of the Convention."<sup>218</sup>

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214. *Id.* Groome suggests that a final judgment in *Milošević* would have been dispositive, see Groome, *supra* note 155, at 964, though the ICJ itself never adopts this view, calling such a judgment only persuasive.

215. *Application of Convention on the Prevention and Punishment of the Crime of Genocide*, 2007 I.C.J. 91, ¶ 219.

216. *Id.* ¶ 273 (citing Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶¶159, 161 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004)).

217. *Id.* ¶ 276.

218. *Id.* ¶¶ 304, 315–16.



These two camps were hardly the only evidence the ICJ considered, and even for them, other evidence was adduced that did not rely on a “non-definitive finding.” It is the fact that the ICJ’s judges used the Decision’s reference to these camps at all, however, and precisely in this pedestrian way, that is of note. Surrounding the ICJ’s citation of the Decision’s Luka Camp review are citations to judgments in *Brdanin*, *Krnjelac*, *Stakic*, *Nikolic*, *Sikirica*, and *Jelusic*, as well as the report of the Commission of Experts and General Assembly and Security Council resolutions.<sup>219</sup> The ICJ treats the evidence in the Decision exactly as it does final judgments, acting as if the *Milošević* chamber had accepted the truth of testimony it cited, whereas the chamber had specifically refused to evaluate evidence with the finality upon which another court might rely. To the degree the ICJ’s finding “by overwhelming evidence” is built upon the Decision, it misreads and overreaches, but also grants a retrospective authority to the Decision.

Moreover, the ICJ was perfectly capable of reaching back into the *Milošević* case itself, to evaluate pieces of evidence on their own merits when it wished—its concerns about conclusiveness notwithstanding. In the most decisive such instance, the ICJ reaches directly back for testimony from the trial:

The Applicant has drawn attention to certain evidence given by General Wesley Clark before the ICTY in the *Milošević* case. General Clark referred to a conversation that he had had with Milošević during the negotiation of the Dayton Agreement. He stated that

“I went to Milošević and I asked him. I said, ‘If you have so much influence over these [Bosnian] Serbs, how could you have allowed General Mladić to have killed all those people at Srebrenica?’ And he looked to me – at me. His expression was very grave. He paused before he answered, and he said, ‘Well, General Clark, I warned him not to do this, but he didn’t listen to me.’ And it was in the context of all of the publicity at the time about the Srebrenica massacre.”

General Clark gave it as his opinion, in his evidence before the ICTY, that the circumstances indicated that Milošević had foreknowledge of what was to be “a military operation with a massacre.” The ICTY record shows that Milošević denied ever making the statement to which General Clark referred, but the Trial Chamber nevertheless relied on General Clark’s testimony in its Decision of 16 June 2004 when rejecting the Motion for Judgment of Acquittal.<sup>220</sup>

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219. *Id.* ¶¶ 274, 254, 258, 261, 263, 266, 268, 252, 266, 271–72, 274–75.

220. *Id.* ¶ 437 (citing *Milošević*, Transcript for Dec. 16, 2003, at 30494–30495, 30497; and Decision on Motion for Judgment of Acquittal ¶ 280).

The ICTY “relied on General Clark’s testimony” only in the technical sense that it did discuss it in the Decision, but it is a clear misreading of the Decision and the Rule 98*bis* process to say that the chamber “relied” on Clark’s testimony in any definitive sense; the ICTY’s judges were obliged to assume the credibility and reliability of the prosecution’s evidence, whether or not they themselves actually believed it. Here, however, the ICJ is assuming that testimony from *Milošević* has probative value because it has been laundered through the Decision.<sup>221</sup>

The ICJ first announces a strict and skeptical standard forbidding reliance on anything but final judgments, but then relies heavily on Rule 98*bis* decisions,<sup>222</sup> as well as underlying evidence that fails to meet its own standards. In a way, it is a formalistic game: the ICJ could cure the defects in its discussion of the Decision simply by considering the underlying evidence as its own, rather than as a derivative product of another court; it could have simply asked itself what it thought Clark’s statement meant, or heard Clark directly as a witness.<sup>223</sup> But this solution merely returns us to the theme that evidence either has intrinsic value or not, but acquires none through the trial process unless and until that process characterizes it in some definitive way. The ICJ standard confirms precisely to that logic, which it then fails to follow.<sup>224</sup>

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221. *Bosnian Genocide* also considers expert reports and other testimony from *Milošević*. These include reports by András Riedlmayer on the destruction of cultural heritage, *id.* ¶¶ 339–43 (“Mr. Riedlmayer’s findings do constitute persuasive evidence as to the destruction of historical, cultural and religious heritage in Bosnia.”), Robert Donia, on Serbian geopolitical aims, *id.* ¶ 371, as well as testimony by Lord Owen and the Deputy Commander of Dutchbat proffered by Serbia, *id.* ¶ 412 (noting, however, that the testimony “does not establish a factual basis for finding the Respondent responsible on a basis of direction or control”).

222. The ICJ also discusses the test for the motion of acquittal from *Jelišić* and the Rule 98*bis* decision in *Krajišnik*. *See id.* ¶ 219.

223. *See* Rules of Court art. 62, 1989 I.C.J. Acts & Docs. No. 5, at 133.

224. In turn, *Bosnian Genocide* itself was followed: the International Criminal Court relied on the ICJ case in rejecting genocide charges for President Omar Al Bashir of Sudan, “observ[ing] that a similar approach has recently been taken by the ICJ in its Judgment on Genocide,” listing several examples from *Bosnian Genocide*, and citing to the same conclusions that rely in part on the Decision’s discussion of Luka Camp. *See* Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Public Redacted Version, Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶ 194 & n.221 (Mar. 4, 2009), *overturned on other grounds*, Case No. ICC-02/05-01/09-OA, Judgment on the Appeal of the Prosecutor Against the “Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir,” at 3 (Feb. 3, 2010).

C. *The Obligation of Possibility—Academic Critique  
of the ICJ Judgment*

The ICJ judgment was widely criticized, in part for its failure to consider more rigorously the evidence from ICTY trials and, in particular, the Supreme Defense Council transcripts.<sup>225</sup> In a recent article, a former ICTY prosecutor, Dermot Groome, offers a searching critique of the ICJ's use of evidence from *Milošević*.<sup>226</sup> Rather than criticizing the ICJ's doctrinal deviance, however, Groome's critique is premised on the significance of the Decision, and demonstrates the creative use to which the Decision's "sufficient evidence" standard can be put, even as it, quite correctly, reaffirms the limits that standard imposes on creative repurposing.

"[G]iven the parity between the central issues of [*Milošević* and *Bosnian Genocide*]," Groome argues that "the [Decision] merits close attention for what it says about the evidence of genocide and the relationship of Serbia to the crimes committed in Bosnia."<sup>227</sup> He reviews the evidence considered in the Decision—evidence of Milošević's role as the pivotal figure in Serbian politics; Milošević's own statements showing his control; his consequential negotiations with foreign interlocutors; his control of armed forces in the various theaters; the logistical support provided by Serbia to Serbs in Bosnia and Croatia; evidence that Bosnian Serb officers were paid by Belgrade until 2002; evidence of joint planning between the various Serb armies; and evidence that Milošević made assiduous

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225. See, e.g., Marko Milanovic, *State Responsibility for Genocide: A Follow-Up*, 18 EUR. J. INT'L L. 669, 678 (2007) ("If the Court had indeed ordered Serbia to produce the documents, Serbia would likely have complied, as there were no objective reasons for making them available to the ICTY and not to the ICJ. Even though the ICJ, unlike the ICTY, possesses no subpoena power, if Serbia had failed to abide by the Court's order, it would have had to suffer the consequences, since the Court would have been able to have much greater recourse to inferences in order to establish Serbia's knowledge of the genocide."); Susana SáCouto, *Reflections on the Judgment of the International Court of Justice in Bosnia's Genocide Case Against Serbia and Montenegro*, 15 HUM. RTS. BRIEF 2, 4 (2007) ("The Court's failure to consider the evidence in a holistic or collective manner is disconcerting, particularly in light of the fact that, as mentioned earlier, the Court also refused to draw any conclusions from Serbia's failure to turn over unedited copies of the Supreme Defence Council documents."). But see C. F. Amerasinghe, *The Bosnia Genocide Case*, 21 LEIDEN J. INT'L L. 411, 428 (2008) (characterizing the ICJ's approach to evidence as "liberal" and describing the case's significant and positive contribution to international law); Birkland, *supra* note 206, at 1649 (giving a positive reading of *Bosnian Genocide*'s broad interpretation of the obligation to prevent genocide).

226. See generally Groome, *supra* note 155.

227. *Id.* at 965.

demands to be kept informed of events in Bosnia.<sup>228</sup> Completing his survey, Groome concludes:

While this determination by the trial chamber carries none of the weight of a final judgment regarding the evidence, it does indicate that there was sufficient evidence for a reasonable trial chamber to potentially convict Milošević of genocide. Given the similarity between the issues in the Milošević case and Bosnia's claim of genocide before the ICJ, this body of evidence had similar potential for the ICJ case.<sup>229</sup>

This is technically accurate—evidence was available that the ICTY Trial Chamber had not deemed obviously insufficient. The Decision indicates, in other words, that some other reasonable court, like the ICJ, could find the evidence sufficient for conviction. The ICJ chose to examine some evidence, though only a small amount and that haphazardly. For Groome, this is not enough; the “reasonable possibility” of review implies an imperative:

[T]he ICJ decided to place no reliance on the findings of the Milošević trial chamber in its [Decision]. However, given the Milošević trial chamber's finding that there was sufficient evidence upon which a court could find Milošević guilty of the crime of genocide, and given the parity between the Milošević case and the ICJ case, a thorough inquiry into Bosnia's claims before the ICJ required the ICJ to examine the evidence referred to in the [Decision] to adjudicate the case before it.<sup>230</sup>

This is a possibilitative argument—that a thing is necessary merely because it is possible. Note the use of the word “required”—because some court could find this evidence sufficient, this court *must* review it.<sup>231</sup> This is, in other words, an attempt to make the interim Decision—in light of the subsequent lack of final judgment—into a mandatory writ for another review. Groome is an accomplished lawyer, and admits what he must about the Decision; his desire to deploy it leads him to adopt an essentially procedural move – indeed, the valence created by the Decision's doctrinal structure really left no other option. It is true that a full acquittal at the Rule 98*bis* phase would have been an authoritative moment of interpretation; its own denials notwithstanding, the ICJ would have been hard-pressed to find Serbia at fault in the face

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228. *Id.* at 967–74.

229. *Id.* at 974–75.

230. *Id.* at 975.

231. *See id.* (noting that the possibility of a broader JCE finding in the Decision makes such a review “all the more compulsory”).

of a preemptory acquittal of Serbia's leader.<sup>232</sup> Yet the opposite outcome—continuation of the trial—does not yield an equal obligation in the opposite direction, nor an equally authoritative interpretation.

D. *Extracting Authority from the Decision—The Rio Conference Report*

The judges who wrote the Decision were concerned not only with the consequences for *Milošević*, but with the broader institutional effects of the Rule 98*bis* process. One way of reading the Decision, and one use for it, is as an influence on ICL's developing jurisprudence. A conference of the International Law Association (ILA) illustrates how one can extract authoritative text from the Decision to advance claims about the law; but equally, the ILA's efforts suggest important limits on how much one might do with a terminated trial.

The ILA Conference Report, which is concerned with the rules for the use of force, relies on the Decision in formulating its definition of armed conflict.<sup>233</sup> The Report notes that the Decision favors the broader approach taken in *Tadić* over the more restrictive view in the ICRC Official Commentary to Common Article 3, while also declaring that the two are not inconsistent<sup>234</sup>—a consequential difference for how broadly or narrowly the scope of international humanitarian law is applied. The point is that the Report builds its case with citation to the Decision, without any need to mention its interim nature.

Where the *Milošević* judges are discussing legal tests, they often speak in their own voice, and the strictures of Rule 98*bis* evidently relax. Thus, in the Decision's discussion of the test for armed conflict, after initially noting the *amici*'s contention that there was no evidence of armed conflict in Kosovo before March 24, 1999, the chamber proceeds to a discussion of the existing law and the tribunal's jurisprudence for seven paragraphs, during which a single

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232. *Id.* at 964. To the degree the ICJ's standard of proof actually is lower than for criminal trials, it would still be possible for it to find against Serbia after criminal acquittal, just as a civil trial's "balance of probabilities" is not precluded by prior criminal acquittal. PETER MURPHY, MURPHY ON EVIDENCE 108 (8th ed. 2003) (describing the common law approach); see also JULIANE KOKOTT, THE BURDEN OF PROOF IN COMPARATIVE AND INTERNATIONAL HUMAN RIGHTS LAW 18–21 (1998) (comparing German and American standards of proof in civil and criminal law). See generally Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243 (2002) (comparing civilian and common law standards in civil trials).

233. See INT'L LAW ASS'N, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 10–11 (2010).

234. *Id.* at 14–15.

mention is made of views advanced by the prosecution and the *amici*, and none of any evidence led or challenged.<sup>235</sup> The analysis is not couched in the hypothetical, tentative language of what a trial chamber *might* decide; instead, “[i]t is settled in the International Tribunal’s jurisprudence,” “[t]he Trial Chamber makes the following observations on the Tadic test” and so forth.<sup>236</sup> This is the most confident language in the Decision; other Rule 98bis decisions display a similar confidence when deciding legal tests, as opposed to weighing evidence.<sup>237</sup>

Other sections of the Decision demonstrate a similar pattern. In the discussion of deportation and forcible transfer,<sup>238</sup> there are more mentions of the prosecution and *amici* positions, in part because they substantively disagree about the correct legal characterization of the crimes, but the overall tenor is the same—the chamber is speaking in its own voice.<sup>239</sup> Likewise, in discussing the proper *mens rea* for genocide, the Decision notes the *amici*’s contention that the *mens rea* for genocide cannot be reconciled with the *mens rea* for command responsibility, but then says that “[o]n the basis of the Decision of the Appeals Chamber in *Prosecutor v. Brdanin*, this submission is unmeritorious.”<sup>240</sup> Here, the chamber is not simply considering the possibility that the prosecution’s preferred rule could be applied by a reasonable judge; instead, the chamber is decisively dismissing the *amici*’s view as a matter of law—a clear decision “on the merits.”

Consequently, this is also the most authoritative form of reliance on the Decision. The ILA’s reliance on the Decision as an expres-

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235. See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶ 15 (Int’l Crim. Trib. for the Former Yugoslavia June 16, 2004), available at [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/040616.htm](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.htm) (“Both the Prosecution and the *Amici Curiae* agree as to the requirement of an armed conflict for Articles 3 and 5 of the Statute.”). This is a profoundly uncontroversial point, and this may be just a convenient way for the Chamber to note that.

236. *Id.* ¶¶ 15, 18.

237. See, e.g., *Prosecutor v. Stakic*, Case No. IT-97-24-T, Decision on Rule 98bis Motion for Judgment of Acquittal, ¶ 107 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 31, 2002) (“Moreover, the Trial Chamber observes that it derives from the very nature of the act of instigation and the fundamental requirement of causation, that a concrete person or group of persons prompted has not already, and independently from the instigator, formed an intent to commit the crime in question (*omnimodo factururus*). Therefore, it would have been part of the Prosecutor’s burden of proof to demonstrate that the principal perpetrator of the crime was not already dedicated to its commission, and, as such should have been pleaded in the Indictment.”).

238. *Milošević*, Decision on Motion for Judgement of Acquittal ¶¶ 41–82.

239. And at much greater length—the Chamber discusses the cross-border element of deportation for over twenty paragraphs. *Id.* ¶¶ 47–69.

240. *Id.* ¶ 300. There are many examples throughout the Decision.

sion of the law seems supportable because in actuality, the chamber is expressing its own view.<sup>241</sup> Of course, where the Decision is most authoritative is also where it is most anodyne, regurgitating legal standards with long pedigrees in other cases. In its discussion of *mens rea*, for example, the chamber dismisses the *amici* by citing *Brdanin*,<sup>242</sup> and this is typical.<sup>243</sup> As we have seen, the Decision's discussion of the Rule 98*bis* standard of review is itself derivative of *Jelisić*, *Tadić*, and ultimately *R. v. Galbraith*.

It is not always this way. We have seen how the chamber used the Decision to "clarify" the bases for applying *Jelisić's* Rule 98*bis* sufficiency test, for example, and, logically, Rule 98*bis* decisions are the best place to affect the law on how Rule 98*bis* decisions are made. Certainly an assertive court could use a Rule 98*bis* decision to advance a judicially constructed rule as well as it could use any other document, in which case scholars and practitioners would be well-advised to consider a decision's actual impact, whatever the formal, doctrinal constraints.

Yet even with this caveat, the Decision's authority is greatest where it is least engaged with the evidence—which is to say, with the putative purpose of the entire exercise. The chamber's authoritative capacity to advance the law is as great here in the Decision as in any document, including a final judgment,<sup>244</sup> but only on a circumscribed set of legal and procedural issues that, structurally, do not reach to the question of individual guilt or innocence, let alone to questions of shared narrative. The authoritative narrative theory relies, in significant part, on the procedural integrity of the trial process to claim its special power, but this does not mean it is

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241. As to the substance of this view, see Grant Dawson & Rachel Boynton, *Reconciling Complicity in Genocide and Aiding and Abetting Genocide in the Jurisprudence of the United Nations Ad Hoc Tribunals*, 21 HARV. HUM. RTS. J. 241, 267–74 (2008) (describing the impact of Rule 98*bis* decisions in *Stakić* and *Milošević* on the distinction between complicity in and aiding and abetting genocide).

242. *Milošević*, Decision on Motion for Judgement of Acquittal ¶ 300.

243. See, e.g., *id.* ¶ 25 ("On the basis of this evidence, the Trial Chamber is satisfied that the conflict in Kosovo meets the first element of the Tadić test."); *id.* ¶ 291 ("The Appeals Chamber in *Prosecutor v. Brdanin* held that there is no incompatibility between the requirement of genocide and the *mens rea* requirement for a conviction pursuant to the third category of joint criminal enterprise; it is therefore not necessary for the Prosecution to prove that the Accused possessed the required intent for genocide before a conviction can be entered on this basis of liability."); *id.* ¶ 295 ("The Trial Chamber observes that the Appeal Chamber's conclusion that the proper characterization of Krstić's liability is aiding and abetting is confined to the facts of that case.").

244. The value of the Decision may have been increased by a temporary circumstance: The ILA report, produced in 2008, could not rely on the still ongoing *MOS* trial; it is possible that the final judgment in that case would have exercised a displacing effect.

concerned only with process—in the end, the theory rises, or falls, on the stories it can tell about what happened, and what it meant. These are claims about the substance of judgment.

E. *Doctrine's Constraint—The Decision's Structural Inadequacy*

The *post mortem* deployments of the Decision have been limited and cautious. There are few extravagant or tendentious claims for its probative value or its authority. Some actors have tried to mobilize the Decision as a kind of ersatz judgment, but these efforts feel half-hearted, because they are seriously limited by the doctrinal straitjacket Rule 98*bis* creates; even the most ambitious advocates are compelled to acknowledge that the Decision is not a verdict. For anyone who has ever felt the pull of the most skeptical, critical views of law—that nothing drives legal analysis other than actors' preferences—the Decision's restrained deployment is a bracing riposte, a reminder that text, process and doctrine matter. The very fact of this restraint, this non-use—especially by actors with evident convictions about Milošević's guilt—suggests the limited utility of anything other than final judgment in constructing claims that rest on judicial authority.

In particular, there is a notable absence of claims that the Decision—really, the *Milošević* trial in general—has contributed to the construction of an authoritative narrative, despite its early promise and the hopes ringed round what was, when it began, the most important of the ICTY's trials. That advocates of the authoritative narrative school did not pick up the Decision and make more of it suggests they did not think it would advance their advocacy goals. Either they were uncomfortable with its specifics—concerned, in other words, that it might point towards acquittal<sup>245</sup>—or they recognized that this less-than-judgment was structurally inadequate.

If a trial reaches final judgment, no one is terribly concerned with earlier interim decisions; it is only when a trial is terminated that a prior interim decision potentially assumes greater importance. This suggests a mismatch between an interim judgment's initial design and its deployment after a case. The Decision was designed to serve a specific purpose in the middle of the trial; it was not designed to bear the load of final judgment, and deploying

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245. As noted, commentators supposed that the prosecution's case was not going well. This suggests a curious feature of the authoritative narrative theory, and indeed of claims that ICL promotes reconciliation more broadly—the implicit assumption that the narrative will and should be one of guilt and conviction. Acquittal is not the point of ICL-as-reconciliation, even though, in theory, that should be equally efficacious.



it for that purpose would stress the unfinished edifice. Logically, this is true for any document, work or decision produced in the course of a trial that is subsequently ended before judgment, apart from those that have an internal finality (such as adjudications about points of procedure), including all the substantive evaluations of fact upon which the authoritative narrative theory principally relies.<sup>246</sup> Formal, legal authority may or may not do what its advocates claim; in terminated trials, it surely cannot.

For what does rejection of a claim under Rule 98*bis* mean? What does it indicate about the shape of the law? Accepting a motion to acquit is consequential: if the chamber had sided with the *amici* on a point of law—for example, finding that no international armed conflict existed prior to March 24, 1999, and that a suite of charges would therefore have to be dropped—this would have had an undeniable impact on the development of the law and provided confident guides to the contours of jurisprudence. Points on which the evidence was in fact deemed lacking can be profitably studied to determine what constitutes an obviously insufficient argument.

Yet rejecting a motion to acquit does not have an equally unambiguous impact. Perhaps, if a chamber were to reject a motion in particularly emphatic terms—saying, in effect, that no reasonable trier could *not* convict or that no one could accept the defense (or *amicus*) interpretation—that might constitute a clear indicium. Yet anything less—anything that merely proceeds along the doctrinally established path for Rule 98*bis* review—tells us almost nothing.

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246. Indeed, *any* element of the trial process prior to final judgment might theoretically be invoked in this way – the mere fact of arrest and indictment can hang over a defendant long after his acquittal. Rule 98*bis* decisions are not the only documents that occupy this ambiguous space – any interim decision might be invoked following the abrupt termination of a trial – nor is this limited to the ICTY: Proceedings to confirm charges at the International Criminal Court are preliminary and are not binding on the sitting trial chamber, but they can have consequential effects and law-making functions. In *Lubanga*, for example, the pre-trial chamber discusses the question of whether the conflict at issue was internal or international, and both examines the Prosecution's evidence and advances its own interpretation. See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶¶ 200–37 (Jan. 29, 2007). If *Lubanga* or another of the ICC's cases was subsequently terminated prior to final judgment, it is conceivable that the confirmation stage could be invoked, as the Decision was by the Del Ponte, to suggest some measure of official review. However, indictments and confirmation hearings also have an even lower evidentiary threshold, making them even more limited, doctrinally, than the Decision. Cf. Freeland, *supra* note 106, at 135 (noting that “the standard applied by the tribunal [in Rule 98*bis* decisions] appears to be of a higher threshold than with the confirmation of an indictment.”). To date there is little evidence that any interim decision at the ICC has been invoked to advance claims of guilt, whether in its ongoing cases or in the two cases in which the defendant has died.

Apart from its discussions of legal standards, not a single piece of factual evidence deployed in the Decision can be confidently assigned a definitive value, except those the chamber expressly rejected as insufficient—those we know, but of the rest, nothing.

For if the Decision cannot bear the weight of judgment and cannot perform the authoritative functions of judgment, how can the raw evidence itself do these things? One can review the Decision's review of the evidence, but what can one say at the end? That he finds it persuasive? That he agrees or disagrees with the chamber's gloss? Perhaps, but nothing more. All we can say about this evidence—as an element of the Decision—is that it was not so insufficient, so ludicrous, as to compel the chamber to order acquittal. The evidence has no more juridical value, and no more interpretative value, apart from being a kind of summary. If it is to contribute to a transformative narrative and to reconciliation, that evidence will have to be deployed in other ways, according to other theories about how post-conflict communities reach consensus on divisive issues.

## VI. CONCLUSION: THE LIMITS OF JUDGMENT

### A. *Authority after Death—Non-Legal Narratives*

The radically limited utility of the Decision does not mean that a terminated trial cannot contribute to goals of transformation and reconciliation in any way. Advocates of the narrative theory do not argue that a single trial, alone, produces the full complexity of judicial truth. The events of the *Milošević* trial have been adjudicated in other cases before the ICTY, as well as in domestic war crimes trials, which may both rely on its evidence and, in their own proceedings, cast light on issues that were not resolved.<sup>247</sup> Of course, many of the same constraints that operated for the ICJ in deploying the Decision or the evidence from *Milošević* apply equally for those trials; if they do contribute to the creation of narrative, it is more likely in parallel, rather than that the *Milošević* trial as a process is making a direct contribution to those trials.<sup>248</sup>

247. Significant trials that overlap with *Milošević* include the *MOS* trial (for Kosovo) and *Stanišić/Simatović* and *Karadžić* (for Bosnia). See Prosecutor v. Milutinović, Case No. IT-99-37-PT, Third Amended Indictment (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2002); Prosecutor v. Stanišić, Case No. IT-03-69, Indictment (Int'l Crim. Trib. for the Former Yugoslavia May 1, 2003); Prosecutor v. Karadžić, Case No. IT-95-5/18-1, Amended Indictment (Int'l Crim. Trib. for the Former Yugoslavia Apr. 28, 2000).

248. Although there are provisions for international tribunals to use adjudicated facts, these are quite limited; evidence presented in *Milošević* cannot simply be imported into

Instead, processes outside of the formal legal system may have greater flexibility in deploying the evidence and Decision. Independent legal analysis and history writing provide alternative ways of producing narratives that can do at least as much informational and persuasive work as a legal judgment. The Human Rights Watch report *Weighing the Evidence* represents a strong example of the claim that the trial process and materials have considerable value on their own. *Weighing the Evidence* cites extensively from the trial evidence, principally from the prosecution phase, to build an argument about what happened during the Yugoslav wars and who was responsible. The report describes its own standard of review:

Human Rights Watch did not attempt an exhaustive review of the evidence introduced a [*sic*] trial. Human Rights Watch did consider Milosevic's cross-examination and defense and we did not include evidence where we felt Milosevic had raised valid questions in rebuttal as to the value of the evidence.<sup>249</sup>

This is a quasi-judicial standard, although one admittedly conducted at a remove and without any capacity to intervene in the give-and-take between prosecution and defense. The report reviews the evidence *de novo*, not filtering it through the Decision, although it often could have.<sup>250</sup> This asserts the autonomous value of the evidence, which can be evaluated substantively, without reference to the chamber's formalistic review standards. Indeed, in theory, an outside observer like Human Rights Watch could disagree with the Decision about the evidence: even if the chamber threw out a particular allegation, Human Rights Watch could in effect "reinstate" it in its own analysis; equally, it could "acquit" Milošević on a count that the chamber upheld.<sup>251</sup>

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other trials, because of the procedural and fairness commitments of the adversarial trial model.

249. HUM. RTS. WATCH, *supra* note 64, at 16. This is a filter that the Trial Chamber, taking the prosecution evidence at its highest, did not apply.

250. For example, on Belgrade's financial and material assistance to the Croatian and Bosnian Serb armies, both the Decision and the HRW report mention statements by Ratko Mladić, testimony from General Végh, the plan of supply codenamed "Izvor," and testimony by Dr. Williams. *See id.* at 16, 36–37; Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, ¶¶ 261, 273, 271, 258 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004), *available at* [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/040616.hum](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.hum).

251. I have not found any instance of the report actually doing this. This may be mere coincidence, but it may represent a kind of gravitational effect of the Decision on how outside analysts weigh evidence. In any event, it would be interesting to consider how other actors might have approached the underlying evidence in *Milošević* if there had never been a Decision (either because Milošević had died before one had issued, or because the ICTY's Rules had not contemplated one).

Likewise, narrative accounts of the trial, like Boas' and Armatta's,<sup>252</sup> which draw on the trial evidence but also on data and analysis of the whole trial process and the broader conflict in the former Yugoslavia, may in time produce accounts that embed themselves in popular memory as definitive retellings of Milošević's (and his regime's) responsibility. So far these works have been produced by insiders or close observers of the trial, but the enormous *Milošević* archive is—or rather will be<sup>253</sup>—a rich source for historians and other analysts; from it, they can construct accounts that, through their coherence and persuasiveness, can acquire a kind of authority. This means the trial could, indirectly, contribute to the kinds of processes that the authoritative narrative theory contemplates: "In time, evidence introduced in the Milošević case may go some way toward vindicating these hopes [for recognition of crimes in Serbia]. Scholars and non-governmental organizations have begun what will likely be a long process of reclaiming that evidence and establishing non-judicial processes of learning from it."<sup>254</sup> Thus even if the authoritative narrative theory in its pure form cannot extract value from a terminated trial, other narrative forms may be possible, and may be efficacious.<sup>255</sup>

But whatever their effects, advocacy and scholarship of these forms will, of necessity, contribute to an entirely different genus of authority than the specific kind that is supposed to be afforded by judgment. A report like *Weighing the Evidence* or archival work by scholars demonstrates both what can be achieved through private

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252. ARMATTA, *supra* note 5; BOAS, *supra* note 14.

253. Planning to preserve the ICTY archives and ensure access to them is ongoing; however, it is unlikely that all material, including the most sensitive material, will be released in the near future. See Robert Donia, *ICTY Archive Must be Open to All*, INST. FOR WAR & PEACE REPORTING (Apr. 4, 2008), [http://www.iwpr.net/?p=tri&cs=f&co=343812&capc\\_state=henh](http://www.iwpr.net/?p=tri&cs=f&co=343812&capc_state=henh).

254. ORENTLICHER, *supra* note 37, at 73; see also WILSON, *supra* note 19.

255. It would be interesting to consider a thought experiment: Imagine a team of respected outside actors assiduously working to duplicate and complete the trial, sifting through the evidence and drafting comprehensive conclusions about Milošević's guilt or innocence. Assuming they had full access to the record, there is no reason to think their conclusions would be any less accurate or informed than those of the actual judges. Their effort might produce a definitive account that was widely accepted (in part due to the integrity and rigor of its process) and even exert a transformative influence. Of course, it would be subject to the same practical constraint that underlies the doctrinal reasons for terminating trials when defendants die – its evaluation could not include arguments and evidence Milošević was unable to introduce because of his death. The team would be compelled to acknowledge the incompleteness, and therefore, the indeterminacy, in its analysis. But such a thought experiment would be very useful in considering what, exactly, is the source and nature of transformative power, if any, in *final* judgments. Thanks to Prof. Nancy Combs for suggesting this.

evaluation of evidence and the limits of that effort, which are precisely defined by the lack of authoritative imprimatur. Anyone can review evidence; it is not the facts produced at trial, but their legal characterization that matters to the particular kind of authoritative narrative ICL is supposed to produce. Historians and legal scholars can contest a court's findings, reinterpret evidence, and even contest authoritative rulings; as cases like *Yamashita* demonstrate, the aggregated opinion of scholars and historians can outweigh a technically authoritative legal judgment.<sup>256</sup> Yet claiming too broad a scope for lay reinterpretation undercuts the original argument for trials, which is that legal decisions contribute specially to judgment, narrative and reconciliation. Any outcome arrived at without going through the forensic processes of formal trial does not, by definition, create the desired effect, the particular effect with which we are concerned. In this sense, other approaches simply recapitulate the problem of authority.

B. *Neither in Death nor in Life—Justice without Transformation?*

The unproductive fate of the Decision and the constricted horizons of the *Milošević* trial as a whole certainly suggest the tenuous nature of ICL's still immature project: so much can depend on a single trial whose outcome, in turn, depends on the health of a single defendant. In a domestic court system, in which thousands of criminal cases may be processed each year, a few terminated cases will not have a large effect. In a small, young system like the ICTY—or any of the current ICL projects—a few terminated cases are a sizable and disruptive fraction of the whole.

Still, precisely because ICL is a young project, it is difficult to reach confident and empirically grounded conclusions about its effects. A terminated trial like *Milošević* clearly cannot accomplish what the authoritative narrative theory expects and intends. What is not clear, however, is whether even final judgments can. As we have seen, after fifteen years, there is little evidence in the former Yugoslavia of the effects the authoritative narrative theory would predict. Does the Decision tell us anything about whether the broader theory of authoritative narrative is right? Did the *Milošević* trial fail to contribute to reconciliation only because it was prematurely terminated, or did it share broader structural constraints

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256. See RICHARD L. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* 137–42 (1982); B.V.A. RÖLING, *THE TOKYO TRIAL AND BEYOND* 85–89 (Antonio Cassese ed., 1993); Ann Marie Prévost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 HUM. RTS. Q. 303, 335–38 (1992).

with other trials that would have limited its effect even if it had reached final judgment?

This Article only makes a limited contribution towards answering that question. The two most critical features of the Decision are its interim quality and the trial's termination; it would overreach to derive from them a claim about the effect of *final* judgment—about whether the authoritative narrative theory works or not. However, this Article's inquiry into the specific relationship between terminated trials and the authoritative narrative theory does make some useful contributions to framing an investigation of the broader theoretical claim, by removing some confounding factors from the puzzle of narrative reconciliation's absence.

First, a close explication of the Decision demonstrates just how structurally insufficient anything other than final judgment is to support the creation of authoritative narrative. If authoritative narrative of the kind the theory predicts were generated by other parts of a trial, their effect should appear even in terminated cases such as *Milošević*, but it does not.<sup>257</sup> This still does not answer the theoretical question—it does not tell us if final judgments actually are efficacious—but it demonstrates that final judgments are the only plausible locus for further investigation of the narrative theory's effects.<sup>258</sup>

Second, this Article further clarifies that investigation's proper scope, because although we know terminated trials do not contribute to authoritative narrative, we also know this cannot be the reason for more general failure of reconciliation in the former Yugoslavia. If *most* trials ended prematurely, we might speculate that this was limiting ICL's reconciliatory effects. But although terminated trials are a real, endemic problem, they are not the norm; most trials reach completion and final judgment, and therefore should have done something, if they do anything.

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257. I am referring to the lack of a specific authoritative effect. As noted in discussing the defense of the authoritative narrative theory and in Part VI.A., incomplete trials have other effects and their evidence may be useful in other contexts, such as history-writing. But none of these other outcomes produce an authoritative narrative of the specifically legal kind, which, the theory claims, has different effects. And if these other outcomes do produce the same or equivalent effects as a final judgment, this only begs the question: why have *trials* exactly—why not rely on these other methods?

258. The only other candidate occasionally advanced is time—the claim that, precisely because ICL is a young field, its trials and institutions have not yet had time to effect reconciliation, whether through narrative means or otherwise. Personally, I think fifteen years should be long enough to see some effect, but more to the point, we should recognize that this argument—though it may be right—is not falsifiable, at least not yet. Future effect is always a possible explanation.

I am skeptical about the special ability of international trials to create or significantly contribute to anything like a transformative narrative, and intend to explore that question in a subsequent article. This Article—more precise and forensic in its aims—has explicated the relationship of the *Milošević* Decision to claims that justify ICL as a source of post-conflict reconciliation, and has shown the Decision's structural incapacity to act as an authoritative narrative. This Article has focused on the specific problem of terminated trials, but in doing so it has helped defined the parameters of the general theoretical question towards which the Decision points us, which concerns the authoritative narrative theory itself. The Decision—that imperfect, interim document—by its very imperfection suggests the need to examine the sufficiency, not of its own transformative potential, but of the idea itself.